



1912 -Unreported printed judgments of the Bombay High Court, 1878 -Vol III -Kaka Judgement (1120)

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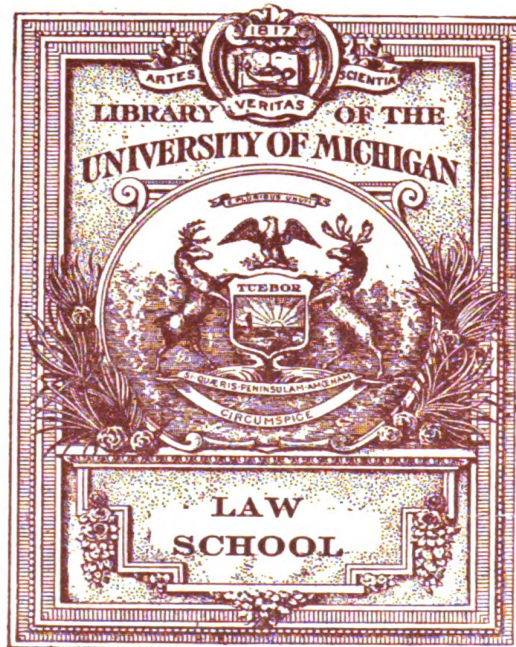
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HIGH COURT OF BOMBAY.

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APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Melvill.*

1878

January 14.

BASAPA BYLAPA (plaintiff) Appellant v. NINGI
BASAPA (defendant) Respondent. *

Restitution of conjugal rights, laches in seeking.

Where a wife left her husband's house in consequence of an assault on her by her husband and his kept mistress, and the husband deferred his suit for restitution of conjugal rights for four years, leaving his wife without maintenance, and then resorted to the Civil Court as a counter movement to an application by the wife to the Magistrate for an order for maintenance. Held, that laches under such circumstances coupled with his previous conduct towards his wife, disentitled him to the assistance of the Court.

This is a Special Appeal from the decision of the District Judge of Belgaum in Appeal No. 171 of 1876.

This is a suit for restitution of conjugal rights brought by a husband against his wife which has been dismissed by the District Judge who has reversed the decree of the Subordinate Judge made in favour of the Plaintiff.

For the following reasons taken collectively, we affirm with costs the decree of the District Judge—1st, that the Plaintiff and his kept mistress in March 1871 assaulted the Defendant whereupon she left his house. The Plaintiff and Santi his mistress were respectively fined by a Magistrate Rs. (10) ten for the assault; 2ndly, the Plaintiff (though perhaps not barred by the law of limitation inasmuch as there does not appear to have been a demand by him for the wife's return, or a refusal by her until the time

* S. A. No. 252 of 1877 (p. 6 of P. J. 1878.)

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of his bringing this suit) deferred the institution of this suit (commenced on the 1st October 1875) for more than four years, and seems to have resorted to the Civil Court simply as a counter movement to an application made by his wife to the Magistrate for an order for maintenance ; the Plaintiff having for the previous four years left her without maintenance. Laches under such circumstances on the part of the Plaintiff, we think, when coupled with his previous conduct towards the wife, disentitles him to the assistance of the Court.

January 30.

Before Mr. Justice West and Mr. Justice Pinhey.

RADHABAI, widow of **KRISHNARAV GANESH**
(plaintiff) Appellant *v.* **DAMODAR KRISHNA-**
RAV, minor, by his administrator **VINAYAK**
PANDURANG (defendant) Respondent.*

Hindu Law—Adoption, conditional—Provision restricting and defining right of adopted son—Life estate to widow.

On an adoption by a Hindu widow the deed of adoption stipulated that the boy on his adoption should be the proprietor of the widow's husband's estate and added that " he is by means of your (widow's) orders the proprietor of the afore-mentioned property, and provided that even after attaining majority the adopted son was to be obedient to his adoptive mother and grand-mother, failing which his maliki or ownership was to abate during their lives and that if he should seek to remove their maliki and keep it all to himself, he should in that case be reduced to an allowance—" so long as you are alive the proprietorship shall be yours."

Held that the widow was not entitled to a life estate in her deceased husband's property under the deed.

This is a Regular Appeal from the decision of the District Judge of Thana in Original Suit No. 7 of 1875.

We are of opinion that on a right construction of the document No. 3 it cannot be taken as reserving to Radhabai a life-estate in the property of her deceased husband Krishnarav. It distinctly stipulates that the boy Purshotam is on his adoption to be " proprietor thereof." It is added no doubt " He is by means of your orders (or ' subject to

* J. A. No. 25 of 1877 (p. 8 of P. J. 1878).



your control') the proprietor of the aforementioned "property, but the distinction between the swamitva or ownership on the one hand, and the swatantrata or independent power of management on the other, is one very familiar to Hindus, as it arises daily out of the relations of undivided sons to the ancestral and paternal estates. There is a further clause providing that even after attaining his majority, the adopted son is to be obedient to his adoptive mother and grand-mother, failing which his "maliki" or ownership is to abate during their lives, and then it is stated more specifically should he seek to remove their maliki and keep it all to himself, he shall in that case be reduced to an allowance—"so long as you are alive the proprietorship shall be yours." These last words, Mr. Branson has argued, are to be separated from the context, and construed as reserving a life-estate to the two ladies, but this is manifestly not the intention. They are meant only to operate in the event of the adopted son acting in the particular way provided against. That this is the true construction is confirmed by the words of the contemporaneous agreement No. 4 in which the ladies say "if perhaps according to the spirit of the times he may wish to assert his independent ownership (*swatantrapane apli maliki karun ichhil*) then he shall not be owner during our lifetime, but shall be content with such an allowance as shall be fixed by four arbitrators." The object was not to create a new estate as between Saraswatibai and Radhabai jointly in supersession of Radhabai's right as widow of Krishnarav, but to give them an ample power of control over the proprietorship fully vested by his adoption in Purshotam whose name thenceforward became Damodar. The subsequent conduct of Radhabai and her mother-in-law shows, we think, that they at the time construed the agreement as the District Judge has now construed it, and such a construction is aided, if that were necessary, by its consonance with the prevailing ideas in Hindu Society, while the construction proposed on behalf of the Appellant would not harmonize with those ideas.

This being our view as to the construction of the documents, and the suit not having been based on any breach of

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duty on the part of Damodar, it is not necessary that we should express any opinion on the decision in Chitko's case. (1) That decision may or may not be open to reconsideration when the circumstances arise which necessarily involve a judgment on the same question. The present is not such a case.

We confirm the Decree of the District Court with costs.

*Before Sir Michael Roberts Westropp, Kt., C. J.
and Mr. Justice Melvill.*

January 28.

The Ahmedabad Municipality (defendant) Appellant
v. GAFARBHAI USMANBHAI (plaintiff)
Respondent. *

Bom. Act VI. of 1873—Privy, Demolition or suppression of—Ultra vires.

Bom. Act VI. of 1873, s. 39, cl. 1 authorizes a Municipality to require the owner of a privy even though it may have been in existence from a period anterior to the coming into force of that Act, to alter, repair or put such a privy in good order in such manner as the Municipality thinks fit. But it has no power to direct the demolition or suppression of any privy which was in existence before the Act came into force, and neither with nor without the sanction of Government has the Municipality any power to pass a bye law authorizing such demolition or suppression.

Alteration, repair or cleansing such a privy is *intra vires* of the Municipality, but demolition or suppression is *ultra vires* of the Municipality.

This is a Second Appeal from the decision of the Acting Judge of Ahmedabad in Appeal No. 136 of 1877 of the District File.

We reverse the decrees of the Courts below, inasmuch as sec. 39, cl. 1 of Bom. Act VI of 1873 authorizes the Municipality to require the owner of a privy, even though it may have been in existence from a period anterior to the coming into force of that Act, to alter, repair or put such a privy in good order in such manner as the Municipality thinks fit. We are inclined to think that the Municipality, although it recited the bye-law (Exhibit 18) in its notice (No. 3), did not intend to require the Plaintiff to do more than alter his privy from being a privy with a deep pit or cess-pool beneath it to one with a floor level with that of

* Appeal No. 279 of 1877 (p. 12 P. J. 1878).

(1) 11 Bom. H. C. R., 199.

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the house and probably containing some iron or metal receiving pan susceptible of being frequently cleansed and incapable of containing any considerable quantity of faecal matter or urine. If, as we are inclined to believe, this and no more was the intention of the Municipality, we do not think that their notice (Exhibit 3) went beyond the law. But that notice is not as clearly and unambiguously expressed as it ought to have been and it is not improbable that it may have led the Plaintiff to suppose that total abolition of his privy was intended. Upon a careful consideration of sections 36, 37, 38, 39 and 40 of the Act, we are of opinion that the Municipality has not any power to direct the demolition or suppression of any privy which was in existence before the Act came into force, and that, neither with nor without the sanction of Government, had the Municipality any power to pass a bye-law authorizing such demolition or suppression. Alteration, repair or cleansing of such a privy is *intra vires* of the Municipality, but demolition or suppression is *ultra vires* of the Municipality. The bye-law (Exhibit 18) contemplates demolition or suppression, and, so far as regards privies in existence before the Act came into force, is unsustainable. The fact that the bye-law is recited in the notice has probably misled the Plaintiff here. Therefore, although we reverse the decrees of the Courts below, we direct the parties respectively to bear their own costs of the suit and of both appeals.

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Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Melvill.

January 21.

GOPAL ANANT (plaintiff) Appellant v. NARAYAN
ANANT, deceased, his heir VENKAJI NARAYAN
and others (defendants) Respondents. *

Parties to suit for partition.

In a ruit regulating the rights of co-parceners amongst themselves who claim with and not through each other, one brother cannot be regarded as representing another.

This is a Special Appeal from the decision of the Assistant Judge of Ratnagiri, in Appeals Nos. 20 and 54 of 1873 of the District File.

° S. A. No. 407 of 1873 (p. 13 of P. J. 1878.)

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We are of opinion that the decree of the District Court must be reversed and that of the Subordinate Judge varied. Inasmuch as the Plaintiff claims through and not with his father Anant, the Plaintiff is bound by Anant's conduct in the suit of 1826 which was brought on account of Anant as head of his branch of the vatandars by his son Narayan, the the first Defendant in the present suit, (see Exhibit No. 182 and the recital therein as to the previous power of attorney, dated 1st March 1826, given by Anant to his son Narayan). In that suit of A. D. 1826 the claim from Anant's branch of the vatandars was for only one tenth of the whole vatan, and to that extent the claim was established. The present Plaintiff's suit must, therefore, fail in so far as it claims for him one-twentieth of the whole vatan. He has four brothers. They and the Plaintiff are entitled only to one-tenth amongst them and to one-fifth of that tenth, i. e., to one-fiftieth part of the whole vatan the Plaintiff is entitled. The Plaintiff is not bound by the proceedings in the suit brought by the Defendants Visaji Narayan Rajadiksh, No. 21 and Narayan Ramchandra, No. 22 to which the Plaintiff was not a party. In a suit regulating the rights of co-parceners amongst themselves, who claim with and not through each other, we cannot regard one brother as representing another brother ; therefore, although Narayan Anant was a party to that suit, we differ from the Assistant Judge in holding him to have represented the present Plaintiff in that suit. None of the decrees in that suit, which was eventually disposed of in the High Court in 1866 or 1867, bind the plaintiff or can now prevent a proper partition being made amongst all of the co-parceners, it having been defective for want of proper parties. The Plaintiff is and must be now declared entitled to one-fiftieth of the whole of the Gawki vatan in the plaint mentioned as against all of the Defendants now upon the record. All of the sons of Narayan Anant, the first Defendant, who has died pending this special appeal, have not been added as parties since his death. His son Venkaji only has been so added. His surviving sons Shridhar and Yeshwant should also be forthwith added as parties (Defendants) to this special appeal, and if they do not within two calendar months after they have been served with notice



of this decree, appear in this Court personally, or by pleader, or Counsel, and object to the same, they shall respectively be bound by the same. And this Court declares the said Venkaji, Shridhar and Yeshwant entitled in right of their father Narayan Anant to one-fiftieth share of the whole of the said Gawki vatan in the plaint mentioned, and the Defendants Vasudev Anant, No. 2, Vithal Anant, No. 32, and and Balkrishna Anant, No. 33, severally and respectively entitled each to one-fiftieth share of the whole of the said vatan—and this Court transfers this cause to the Court of the Subordinate Judge of Vingorla in order that he may declare the shares to which the parties (other than those whose rights are expressly declared in and by this decree.) are respectively entitled in the said Gawki vatan, and such declaration should proceed upon the basis that there are ten branches of the Patilki family, and that each branch is entitled to one-tenth of the said vatan. This Court has by the present decree provided for the allocation of the one-tenth share to which the branch of which Anant Gopal Kamat Adarkar was the head is entitled. It will be the duty of the Subordinate Judge under this decree to declare with respect to the nine other branches of the Patilki family, the shares to which the members of these branches are respectively entitled in the remaining nine-tenths of the said vatan. All of the parties respectively to this suit must bear their own costs of it up to the present time and also their own costs of the regular and special appeals.

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*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Melvill.*

January 29.

**The Mamaltdar of ALIBAG (defendant) Appellant v.
RAVJI BHAU Joshi (plaintiff) Respondent. ***

Principal and Surety—Act XVIII. of 1838, s. 5—Guarantee for good conduct.

The effect of s. 5 of Act XVIII of 1838 which provides " that the liability of the surety or sureties shall not be affected by the death of a principal or by his appointment to a situation different from that which he held when the bond was executed " is to preserve after the principal has been appointed to a new office, the liability of the surety in respect

* Appeal No. 307 of 1877 (p. 15 of P. J. 1878.)



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of defalcations of the principal which occurred when he was in the previous office, his good conduct in which the surety has guaranteed, and not to make him liable in respect of the principal's defalcations in any new office to which he may be appointed. A surety for an acting Talati is, therefore, not liable for defalcations made by him after he has been confirmed in the office of the Talati.

This is an Appeal from the appellate decree of the Joint Judge of the District of Tanna in Appeal No. 518 of 1875.

On the appointment in June 1868 of Moro Visaji as temporary substitute (Badali) in the office of Talati (village accountant) for his father for a period of three months, the Plaintiff entered into a surety bond in Maharati which more or less closely follows the form given in Schedule A of Act XVIII of 1838. As translated by our Interpreter it runs thus :—" Moro Visaji Joshi has been appointed as a substitute Talati. In respect of that I, Ravji Bhau Joshi, have become a surety. I have become responsible in this matter as follows. From the date mentioned below for the coming into force of this bond *so long as the same bond remains in force against the said Moro Visaji*, I become responsible for any demands which may be found due to Government in respect of Government moneys, letters, papers, accounts &c., hereafter. I will pay off the same. And if any Government letters, papers, &c., other than cash moneys be not produced, I will pay upto Rs. 150, i. e., whenever the Collector may determine and claim so much, such amount I will pay to the Government. Date of coming into force, 26th June 1868." Moro Visaji, for whom the Plaintiff became surety was not a party to this bond, nor does the form given in Schedule A of Act XVIII of 1838 contemplate that the person whose conduct is guaranteed should be an obligor, although that form is framed in such a singularly inartistic manner as to provide that the surety A. B. (or sureties A. B. & C D.) shall " make good all demands for public money," &c., " which may arise during such period as this bond may continue in force against the said E. F.," the person whose good conduct is guaranteed. The bond sued on in the same way provides for the liability of the Plaintiff as surety " so long as the same bond remains in force against the said Moro Visaji."

If such a bond were to be construed strictly, the surety could never be liable ; inasmuch as Moro Visaji, not being an



obligor, i. e., a party binding himself by the bond, it never ¹⁸⁷⁸ would be in force against him. What precisely the drafts- ^{THE MAMLAT-} man intended by such a stipulation it is not easy, nor is it now ^{DAR OF ALIBAG} necessary, to say, for it is not upon that stipulation that the ^{v.} learned Government Pleader now relies on behalf of ^{RAVJI.} the Defendant, the Mamlatdar, but upon Section 5 of the Act, which enacts "that the liability of the surety of sureties shall not be affected by the death of a principal or by his appointment to a situation different from that which he held when the bond was executed." The Government Pleader insists that although the defalcations of Moro Visaji did not occur while he was the temporary substitute for his father but after his father's retirement from the office of Talati, and after Moro Visaji had been substantively appointed to it, yet the surety was made liable for those defalcations by the 5th Section, and it was argued that the 4th Section, by enabling a surety to withdraw from his liability at any time by giving sixty days' notice of his desire to do so, supports that construction of Section 5. We are, however, unable to adopt that view. It was for Moro Visaji as a temporary substitute in the office of Talati that the Plaintiff became surety. Assuming that the proviso in Section 5 that the liability of the surety shall not be affected by the appointment of the person called the principal to a situation different from that which he held when the bond was executed, is applicable to such a case as the present, we think that the effect of it is no more than to preserve after the principal has been appointed to a new office, the liability of the surety in respect of defalcations of the principal, which occurred when he was in the previous office, his good conduct in which the surety had guaranteed. The words "holder of the office of &c." which occur in the form in Schedule A possibly suggested the desirability of such a proviso in order to make certain that the liability of the surety for misconduct of the principal while in that office should continue after he left it. The 5th Section, like the form in Schedule A, is very ill drawn. While it specially provides for the continuance of the liability of the surety notwithstanding the death of the principal or of his translation to a new office, it omits the possibility



1878 of his resignation of the original office without the sub-
THE MAHLAT sequent assumption of any other office, and leaves it open to
DAR OF ALIBES an argument that liability of the surety in such an event
v.
RAVSHI is excluded by the special preservation of his liability in
the two other events. The limitation of the liability of the
surety on the occurrence of those latter events (the death or
translation of the principal to another office) to make good
the defalcations of the principal which occurred while he
held his first office, is not inconsistent with Section 4, for
the operation of which there is an ample field, in the power
of the surety to withdraw from liability by giving notice of
his desire to do so during the incumbency by the principal
of the first office. We may add that it is not probable
that the legislature intended to impose upon the surety a
liability in respect of the principal's conduct in a new
office in which there might be far greater temptations to
swerve from the path of honesty than in the previous office,
of which liability the surety could not divest himself until
at least 60 days after he became aware of the principal's
translation to the new office.

For these reasons we affirm the decrees of the Courts
below with costs.

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Melvill.*

January 30.

**SARUPCHAND LALCHAND et al (plaintiffs) Ap-
pellants v. The Collector of Ahmedabad and others
(defendants) Respondents. ***

*Small Cause Court—Jurisdiction—Money improperly
levied by Collector —Second appeal.*

A suit to recover money received by the Collector to the use of the
plaintiffs, is, if less than Rs. 500, cognizable by a Court of Small
Causes, and it follows that no special appeal lies.

/ This is a Special Appeal from the decision of the Acting
Judge of Ahmedabad in Appeal No. 13 of 1876.

It appearing that this suit being one to recover money
received by the Collector to the use of the Plaintiffs (i. e.
moneys alleged to be improperly levied by him) and in which
as the amount sued for is less than Rs. (500), a Court of

° S. A. 384 of 1876 (p. 17 of P. J. 1878.)



Small Causes would have jurisdiction, it follows that no special appeal lies. This Court, therefore, dismisses the special appeal but without prejudice to the right of the Plaintiff to bring a suit to establish their title by way of declaratory decree or otherwise. The Plaintiffs must pay to the Collector his costs of this special appeal.

Before Sir Michael Roberts Westropp, Kt., C. J. and Mr. Justice Melvill.

January 30.

MAHA RANA SHRI GAGUBHA ABHESHANGJI
(plaintiff) Appellant v. **BHAVANIDAS JAGJI-**
VANDAS and others (defendants) Respondents. *

Limitation—Property sold in execution, suit to recover.

A suit to recover property sold in execution of a decree and which treats the sale as a nullity need not be brought within one year from the time of the sale.

This is a Regular Appeal from the decision of the first Class Subordinate Judge of Ahmedabad at Kaira in original Suit No. 3884 of 1872.

The High Court, on the 21st of June 1876, ordered that the Plaintiff should be at liberty to amend his plaint, and expressed its opinion that, unless such an amendment as then indicated were made, the Plaintiff could not have his case properly investigated on the merits. A draft for the amendment of the plaint was presented in the Subordinate Judge's Court, but he erroneously permitted the Defendants to dispute the right of the Plaintiff to make such an amendment, and no such amendment was actually made, although the High Court had already decided that point in the Plaintiff's favour. Again, the Subordinate Judge, although the High Court had decided that the sale in 1859 must be considered as having taken place under the decree of 1849 in Hemabhai's suit, persisted, on the retrial, in treating that sale as made under the decree of 1843 in Bhavanidas' suit. It would have been well if the Subordinate Judge had kept in his mind on the retrial the directions contained in the judgment of the High Court which ordered that retrial. The Subordinate Judge is in error in holding that this is a suit to set aside the sale of 1859, and consequently that

° R. A. 50 of 1877 (p. 18 of P. J. 1878.)



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1878 the Plaintiff was bound to sue within one year from the time of the sale. This is a suit which, if it were well founded, treats the sale as a nullity, inasmuch as the Plaintiff, Gagubha, the son of Abhesang, and, therefore, the true heir of Ramshing (the adoption of Agarsang being invalid) was not a party to the suit of Hemabhai in which the sale must be regarded as having been made. A suit may be brought to set aside that which has been done irregularly, or fraudulently, or through mistake, but not to set aside that which is *ab initio* null and void, as the sale of the estate which had belonged to the deceased Ramshing would be as against the true owner at the time of the decree if made in a suit in which that true owner was not a party. Agarsang, the Defendant in Hemabhai's suit in nowise represented the ownership. He was not the heir, but Gagubha then was so. However, the sale having taken place in 1859, and the plaint in this suit not having been filed until the 1st December 1872, i. e., more than twelve years subsequently, and this Court having in its judgment of the 21st June 1876 decided that the Plaintiff was under the necessity of proving that he was by fraud kept from the knowledge of his having a right of action, and the Subordinate Judge having held that no such fraud has been shown, and the learned pleader for the Plaintiff failing to point out to us any sufficient reason for supposing that finding to be wrong, we must affirm the decree of the Subordinate Judge of the 21st April 1877 with costs of this appeal. It should be especially noted that this Court has, on the hearing of the present regular appeal, permitted it to be argued on the same basis as if the plaint had been amended in the manner ordered on the hearing of the previous regular appeal on the 21st June 1876, and the plaint must be regarded as so amended accordingly.

February 13.

Before Sir Michael Roberts Westropp, Kt., C. J. and Mr. Justice Melvill.

GOSWAMI SHRI GORDHANLALJI GIRIDHARILALJI Applicant v. GOSWAMI SHRI VRAJ OCHHAVJI VRAJRAMANJI alia VRAJRAIJI VRAJBHUKHANJI Opponent.*

* Extra. Appli. 69 of 1877 (p. 29 of P. J. 1878.)

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PRINTED JUDGMENTS.

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*Procedure—Dismissal of suit for default—Removal of
manager of temple—*

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v.
GOSWAMI SHRI
RAJ OCHHAYJI.

A suit should not be dismissed for default of appearance by the plaintiff, where the original plaintiff, who has instituted the suit as manager of a temple but has been subsequently removed from office, is present in Court on the day of the hearing, and contends that he still retains an interest in the suit. This point should be decided and if found against him, the defendant should apply for notice to be issued against the successor of the original plaintiff requiring him to elect within a reasonable time as to whether or not he would proceed with the suit.

This is an Application against the order of the Subordinate Judge of Kaira in Original Suit No. 499 of 1871.

The Plaintiff on record, i. e., the original Plaintiff, was present by his pleader when the Subordinate Judge dismissed the suit as for default of appearance of the Plaintiff, and his contention is and was that although he may have been removed from his office of manager of the temple of Shri Nathji, yet he still retains an interest in the suit, a point on which there has not yet been any decision. If then we regard the original Plaintiff as the Plaintiff in the suit, the Subordinate Judge could not rightly dismiss the suit on the ground of default of appearance of the Plaintiff, and the order to that effect was erroneous.

Again, if we regard the original Plaintiff as no longer an existing Plaintiff, in consequence of his removal from the office of manager of the temple, and that his interest in the suit had then wholly ceased and had devolved upon his successor, and that the suit had therefore abated, the proceeding of the Subordinate Judge, under Sections 114 and 147 of the Civil Procedure Code of 1859, was equally erroneous. On that supposition there was not any Plaintiff in the suit to make a default, and, therefore, there could not be any default to which those sections would be applicable. The proper course in such a case for the Defendant then to have pursued, if he wished to be relieved from the suit, would have been to have applied to the Subordinate Judge to cause a notice to be issued to the successor of the original Plaintiff in the managership of the temple requiring him to elect within a reasonable time as to whether or not he would proceed with the suit. This course has not been pursued, and if we regard the original Plaintiff's interest as wholly deter-

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mined on his removal, there was not, when the Subordinate Judge made his order of the 26th October 1876, any person a party to the suit who represented the interest of the temple and the order was therefore unsustainable.

The only question here really is whether the delay in making this application to this Court in the exercise of its extraordinary jurisdiction is excusable. Looking to the extreme youth of the successor of the original plaintiff in the managership of the temple, (who was, it would appear from the judgment of the Subordinate Judge, a minor when he was appointed manager instead of his father), to the tardiness apparently inseparable from matters in which Native States and Political Agents are concerned, to the absence of the Political Agent with the Chief of Udepur at the Imperial assemblage at Delhi, to the circumstances deposed to in the affidavit made in support of this application, and to the expense already incurred in the prosecution of this suit, and which would be abortive if the application be refused, we think that we ought to excuse the delay which has occurred.

The order of the Subordinate Judge of the 26th October 1876 must be set aside. The Applicants and Respondents must respectively bear their own costs of these applications and of this order. The Subordinate Judge must, after hearing the respective pleaders of the said original Plaintiff and of his said son and of the Defendant, and such evidence as may be offered, decide whether or not the interest of the said original Plaintiff in the subject-matter of this suit wholly ceased and determined upon his removal from the said managership of the temple of Shri Nathji, and if he decide that question in the affirmative, he should strike out the original Plaintiff and substitute his said son as Plaintiff in lieu of him and let him proceed with the suit. If, on the other hand, he should decide that question in the negative, he should permit the original Plaintiff to proceed with the suit.



Before Mr. Justice Melvill and Mr. Justice Kemball.

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VENKAPA, deceased, by his brother and heir **Hariapa Krishna** (plaintiff) Appellant v. **GANGAMA SUBAYA** and others (defendants) Respondents. *

February 26.

Appeal—Appellate Court's power to amend decree against a party not appealing.

In the absence of an appeal by the [defendant, the Appellate Court cannot, on an appeal by the plaintiff, amend the decree in favour of the defendant not appealing.

This is an Appeal from the decision of the District Judge of Kanara in Appeals Nos. 144 and 145 of 1875.

The Subordinate Judge awarded half the house and land to the Plaintiff, and against this decision the first Defendant Gangama did not appeal. District Judge nevertheless amended the Subordinate Judge's decree for the benefit of Gangama, by disallowing the Plaintiff's claim to the half of the house and land which had been awarded to him. We think that, in the absence of an appeal by Gangama, whom the District Judge considers entitled to the house and land, it was not competent to the District Judge to deprive the Plaintiff of the benefit of the Subordinate Judge's decree in respect of the house and land. We, therefore, amend the District Judge's decree, and award to the Plaintiff, in addition to the arrears of rent and manmariyadi mentioned in that decree, the moiety of the house and land which was awarded by the Subordinate Judge. We make no order as to costs.

Before Mr. Justice Melvill and Mr. Justice Kemball.

February 26.

LALBHAI LALLUBHAI (plaintiff) Appellant v. The President of the Ahmedabad Municipality (defendant) Respondent. †

Easement—Right of way—Dedication to public.

A plaintiff's right to assert his title to land is not time-barred merely because people have been in the habit of passing over the ground for 20 years. That circumstance may be evidence from which a jury may presume a dedication to the public, or if such dedication be not proved, the plaintiff's free use of his ground may be restricted by the circumstance that other persons have acquired a right of way over it.

* Appeal No. 322 of 1877 (p. 34 of P. J. 1878.)

† Appeal No. 294 of 1877 (p. 35 of P. J. 1878.)



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THE PRESIDENT
OF THE
AHMEDABAD
MUNICIPALITY.

This is an Appeal from the decision of the District Judge of Ahmedabad in Appeal No. 173 of 1875.

We are very unwilling to remand this case again, but the District Judge's judgment in no way disposes of the issues. If the land belongs to the Plaintiff, has right to assert his title is not time-barred, merely, because people have been in the habit of passing over the ground for 20 years. That circumstance may be evidence from which a jury would presume a dedication to the public (See Bateman *vs.* Bluck, (1) and Addison on Wrongs, Page 186, 2nd Edition) ; or if such dedication be not established, the Plaintiff's free use of his ground may be restricted by the circumstance that other persons have acquired a right of way over it. But the very first thing for the Court below to determine was whether the land originally belonged to the Plaintiff, and if it found on this issue in the affirmative, it might then have gone on to consider whether the evidence was sufficient to establish a dedication to the public. If this were not established, the Plaintiff should have had a decree declaratory of his title, without prejudice to any easement which other persons may have over the land. The decree of the District Court is reversed, and the case remanded for a new decision with reference to the above observations. Costs to follow final decision.

March 6.

Before Mr. Justice Melvill and Mr. Justice Kimball.
NIZAM ALLI KHAN NAJIB KHAN (defendant)
Appellant v. MAHAMAD KHAN SAMSHER
KHAN (plaintiff) Respondent. *

Evidence Act, S. 76—Certified copy of public document, admissibility of.

Certified copies of public documents can only be admitted in evidence under s. 76 of the Evidence Act if they are subscribed with the official title of the Officer by whom they purport to have been given.

This is an Appeal from the decision of the Joint Judge of Tanna in appeal No. 210 of 1876.

It appears to this Court that the Joint Judge has not properly weighed the evidence in this case. Exhibits Nos. 40 and 73 contain distinct admissions of the Plaintiff's vendor, Hussan Khan, that the Defendant, Nizam Ali Khan, had in

* Appeal No. 13 of 1878 (p. 41 of P. J. 1878).
(1) 21 L. J. Q. B., 406.



1862 and in 1873 a mortgage on a portion of the land to which this suit relates. The Joint Judge says that Exhibit 40 was "written according to a prescribed form," but the mention of the mortgage could not be taken from a stereotyped form, and the meaning of the Joint Judge in this observation is not very intelligible. The Joint Judge gets rid of the effect of Exhibit 73 by observing that Duryakhan, who had signed Exhibit 73, afterwards denied the correctness of the information contained in Exhibit 73. The evidence of this denial is contained in the document filed as Exhibit 8 in appeal. The Joint Judge has admitted this document in evidence, on the ground that it is a copy of a public document. But it does not fulfil the conditions for the admissibility of such copies laid down in Section 76 of the Indian Evidence Act, inasmuch as it is not subscribed with the official title of the officer by whom the copy purports to have been furnished. It is impossible to say who that officer was, or whether he had the custody of the public document in question, and was qualified to furnish a copy of it. We think that this document ought not to have been received in evidence. Even if it be admitted, it is worth nothing ; for the circumstance that Duryakhan repudiated his own previous admission, would not invalidate the weight of Hussan Khan's admission, which, so far as appears, has never been repudiated. It may, moreover, be remarked that, even as regards Duryakhan, his evidence given in this suit (Exhibit 76) can hardly be reconciled with his statement, (if he ever made such a statement), that the Defendant had no mortgage on the property. The Joint Judge does not appear to have given any consideration to Exhibit 76.

As regards Hussan Khan's decree (Exhibit 14) on which the Joint Judge has principally based his judgment, that decree was made in a partition suit, in which Hussan Khan obtained a decree for his share. The present Defendant would seem to have been made a party to that suit, as a mortgagee. The fact that Hussan Khan obtained a decree for his share does not involve the inference that the Defendant's mortgage was negatived. Hussan Khan may well have obtained his share, subject to any mortgages existing upon it. And the circumstance of Hussan Khan's sub-

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sequent admissions in Exhibits 40 and 73 tends to show that the intention and effect of the decree, Exhibit 14, could not have been that which the Joint Judge attributes to it.

This Court accordingly reverses the decree of the Joint Judge, and remands the case for a reconsideration of the evidence, (excluding the document Exhibit 8 in appeal), with the reference to the above observations, and for a new decree to be passed. Costs to follow final decision.

March 13.

Before Mr. Justice Melvill and Mr. Justice Kimball.

TRIKAM MADHAVSHET (defendant) Appellant
v. NARAYANRAV VITHALRAV and others
(plaintiffs) Respondents. *

*Small Cause Court, suit cognizable by—Special Appeal
—Incidental determination of title to immovable property.*

No special appeal lies in a suit for personal property or its value where such value is less than Rs. 500, notwithstanding that the lower Court, have, incidentally, and for the purposes of determining the amount of damages, adjudicated upon a question of title to immovable property.

This is a Special Appeal from the decision of E. Hosking, Esquire, Assistant Judge of Tanna, in Appeal No. 346 of 1874.

This is a suit for personal property or its value ; and such value is less than Rs. 500. It is, therefore, a suit of the nature cognizable in a Court of Small Causes, and not a subject for special appeal, notwithstanding that the Courts below have incidentally, and for the purpose of determining the amount of damages, adjudicated upon a question of title to immoveable property. On this ground we dismiss this Special Appeal with costs.

March 13.

Before Mr. Justice Melvill and Mr. Justice Kimball.

NARAYAN RAMCHANDRA (defendant) Appel-
lant v. PARASHRAM MORESHVAR (plaint-
iff) Respondent. †

*Small Cause Court, suit cognizable by—claim for mesne
profits—Incidental enquiry into question of title
—Special Appeal.*

* S. A. 311 of 1876 (p. 43 of P. J. 1878.)

† Appeal No. 337 of 1877 (p. 44 of P. J. 1878.)



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No special appeal lies in a suit for mesne profits which is a suit of the nature cognizable by a Court of Small Causes, notwithstanding that a question of title has been incidentally inquired into by the Courts below.

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~~NARAYAN~~
~~1878-79~~
~~PARASHRAM.~~

This is a Second Appeal from the decision of the Acting Assistant Judge of the District of Tanna, in Appeal No. 308 of 1875.

This is not a suit for rent but for mesne profits, the Plaintiff suing the Defendant not as a tenant, but as a trespasser. It is therefore a suit of the nature cognizable by a Court of Small Causes, and no second appeal is admissible, notwithstanding that a question of title has been incidentally inquired into by the Courts below. On this ground we dismiss the appeal with costs.

Before Mr. Justice Melvill and Mr. Justice Kemball.

March 29.

UDESING and others (defendants) Appellants v.

KAVAJI SATAR (plaintiff) Respondent. *

Estoppel by conduct—Mortgage by brother—Suit against mortgagor only.

Where the defendants intentionally caused the plaintiff to believe that their brother fully represented the family in all matters connected with the mortgage of the family property, they were estopped from denying that the decree obtained by the plaintiff on that mortgage against that brother alone bound the whole property, or from availing themselves of the plea that as only such brother's share is mentioned in the certificate of sale, that share only was sold.

This is a Second Appeal from the decision of the First Class Subordinate Judge of Nasik in Appeal No. 409 1876 of the District File.

It would no doubt have been better if Bhau Harishet had sued all the four Defendants, and put up the property for sale as the property of all the four. But on the facts found by the Court below, we think that the Defendant Devising's three brothers, by their conduct, intentionally caused Bhau Harishet to believe that Devising fully represented the family in all matters connected with the mortgage of the family property, and that they are therefore estopped from denying that the decree which Bhau Harishet obtained against Devising bound the whole property, or from availing them-

* S. A. No. 56 of 1877 (p. 50 of P. J. 1878.)

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selves of what is under the circumstances a merely technical plea, viz, that as only Devising's share is mentioned in the certificate of sale, therefore only Devising's share was sold. We accordingly confirm the decree of the Courts below with costs.

March 25.

Before Mr. Justice Melvill and Mr. Justice Kemball.

GANPAYA MANJANATHAYA Petitioner v.
NARAYANRAV MANGESHWAR
Opponent. *

Construction of decree on mortgage.

Where the terms of a decree are susceptible of two constructions that should be adopted which is the more reasonable.

A plaintiff should not be deprived of any of the usual remedies of a mortgagee unless it was expressly stated in the decree that the mortgaged property only was to be liable.

This is an Application against the decision of the District Judge of Kanara, in Miscellaneous Appeal No. 22 of 1876.

The terms of the decree are not as precise as could be desired : but it appears to us to mean that the Plaintiff is to have a lien on the mortgaged property, but not necessarily that he is to look only to the mortgaged property as his security. Had the latter been the intention, it may be presumed that the Subordinate Judge who made the decree, would have expressly stated in it that the mortgaged property only was to be liable. When the terms of a decree are susceptible of two constructions, we think that we should adopt that which is the more reasonable : and we can see no reason why the Plaintiff should have been deprived of any of the usual remedies of a mortgagee, nor do we believe that such was the intention of the decree.

We reverse the orders of the Courts Below, and direct that the Plaintiff's application for execution be granted in accordance with the terms thereof. Costs on Defendants.

- * Application No. 88 of 1877 under Extra. juris. (p. 51 of P. J. 1878.)



Before Mr. Justice Melvill and Mr. Justice Kembball.

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VITHAI RAVJI (plaintiff) Appellant v. AVJI
SAKHOBHA (defendant) Respondent. *

March 26.

*Res Judicata—Arrangement Subsequent to a decree
in previous suit.*

Where land was assigned to plaintiff's father subsequently to a decree passed against him in consideration of the plaintiff's father not appealing, held in a suit to recover that land that the question of *res judicata* does not arise.

This is an Appeal from the decision of the District Judge of Satara in Appeal No. 119 of 1877.

The District Judge does not appear to have correctly understood the Plaintiff's case. Her case is that subsequently to the decree in suit No. 1123 of 1860, and in consideration of Ravji not appealing, an arrangement was made with the Defendants in that suit, by virtue of which the land now claimed was assigned to Ravji. If this were so, the question of *res judicata* does not arise, the effect of the decree having been removed by the subsequent arrangement. The decree of the District Judge must be reversed, and the case remanded for a new decision. Before deciding the appeal, the District Judge should consider whether there are any grounds for the Plaintiff's allegation that her evidence was not taken. Costs to follow final decision.

Before Mr. Justice Melvill and Mr. Justice Kembball.

March 27.

PANDUBHAT VITHALBHAT (defendant) Appellant v.
BALAJI Krishna (plaintiff) Respondent. †

*Mortgage—Sale in execution of a decree obtained by prior
mortgagee against mortgagor alone after prior sale in
execution of a decree obtained by puisne mort-
gagee—Parties to suit.*

A sale in execution of a decree obtained on a mortgage by a prior mortgagee against the mortgagor alone, after the mortgagor's right, title and interest have been sold in execution of a decree obtained by a puisne mortgagee and purchased by him, passes no title to the purchaser.

* Appeal No. 16 of 1878 (p. 52 of P- J. 1878.)

† S. A No. 6 of 1878 (p. 54 of P. J. 1878.)



This is an Appeal from the decision of the Acting Assistant Judge of Tanna in Appeal No. 293 of 1876.

The property in dispute originally belonged to Devdya, who mortgaged it first to Narayan Bapuji, and afterwards to Defendant. Defendant obtained a decree on his mortgage, put up the property to sale, and purchased it himself. He thus became the owner of the property, subject to a liability to pay off Narayan Bapuji's mortgage. Devdya ceased to have any interest in the property. Nevertheless Narayan Bapuji brought his suit against Devdya alone, obtained a decree against him, and sold the property as Devdya's. The Plaintiff purchased it as Devdya's. But as the Defendant, and not Devdya was the owner of the property at the date of Narayan Bapuji's suit, he ought to have been made a Defendant in that suit, and the whole proceedings in the suit having been taken against a person who was not interested in defending the property, were, so far as regards that property, abortive, and the sale to Plaintiff of the interest of a person whose interest had ceased to exist, conferred on him no title at all. On these grounds we reverse the decree of the District Court, and restore that of the Subordinate Judge, with costs on Plaintiff throughout.

April 2.

Before Mr. Justice Melvill and Mr. Justice Kimball.

BHAU VENKOB (plaintiff) Appellant v. GOVIND YASHWANT *et al* (defendants) Respondents. *

Sale in execution of decree against Hindu widow.

A Hindu widow has something more than a life tenancy. She fully represents the estate, and for certain necessary purposes has full authority to dispose of the property. If she herself sells for a necessary purpose, or if a Court sells the property in satisfaction of a debt incurred for a necessary purpose, the purchaser acquires not a mere life interest, but the entire estate.

This is a Second Appeal from the decision of the Assistant Judge, F. P., of Poona at Sholapur in Appeal No. 203 of 1876.

The Senior Assistant Judge says " it is quite evident that " Sakubai being a Hindu widow had only a life-interest in

* S. A. No. 39 of 1878 (p. 60 of P. J. 1878.)



" the immoveable estate, and that, whatever her estate was, it
" was determined by her decease. Clearly then, she could
" have no interest whatever at the date of the sale. From
" the terms of the decree it appears that the estate was bound
" by it, but the judgment-creditor has attached and sold
" Sakubai's interest only, and the purchaser therefore takes
" nothing under the purchase. " This line of argument
appears to us to be not strictly logical or correct. Of
course neither a Hindu widow, nor any one else, can have
any interest in any property after her death. When prop-
erty is sold as the property of a deceased person in the hands
of his or her representative, what is sold is the right, title, and
interest which such deceased person had in the property during
his or her life-time. The question in the present case, therefore,
is what was Sakubai's interest during her life-time. It is quite
settled that a Hindu widow has something more than a life-
tenancy. She fully represents the estate, and for certain
necessary purposes, has full authority to dispose of the prop-
erty. What she could give, her creditors can take : and,
therefore, if she herself sells for a necessary purpose, or if a
Court sells the property in satisfaction of a debt incurred for
a necessary purpose, the purchaser acquires not a mere life-
interest, but the entire estate. Now the Senior Assistant Judge
says that, from the terms of the decree under which the prop-
erty in this case was sold, it appears that the estate was bound
by it. If that were so, we should have no difficulty in holding
that the Plaintiff acquired the whole estate. The decree,
however, does not appear to contain any such declaration.
On the other hand, after considering the proceedings and
judgment in the suit in which that decree was passed, we
come to the conclusion that it really was decided (we
do not say on sufficient grounds) that the property in dis-
pute was liable in the hands of the present defendants for
Sakubai's debt. The present Defendants were Defendants
in that suit, having been introduced as representatives of
Sakubai : and their contention was that no property in their
hands had come to them as Sakubai's property, or was liable
for her debt. The Subordinate Judge distinctly held that
the field now in dispute was liable in their hands, as Saku-
bai's property, for Sakubai's debt. It is true that the Sub-

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ordinate Judge did not, as he ought to have done decide what was the nature of Sakubai's debt : but he determined that the field now in dispute was liable for it and having failed in their contention on this point during the suit, the Defendants cannot now be allowed to reopen the same question in order to defeat the purchaser at the sale under the decree. We accordingly reverse the Senior Assistant Judge's decree and restore that of the Subordinate Judge. Costs of Appeal and Second Appeal on Defendants Govind and Hari.

April 9.

Before Mr. Justice Melvill and Mr. Justice Kemball.

LALCHAND NARAYANDAS (plaintiff) Appellant
v. TUKARAM MANAJI (defendant) Res-
pondent. *

Mortgage—Equity of redemption.

A plaintiff who is the owner of an equity of redemption only cannot recover any part of the property without first paying the amount due on the mortgage.

This is an Appeal from the decision of the Acting District Judge of Khandesh, in Appeal No. 133 of 1876.

The Plaintiff is owner of an equity of redemption only, and therefore he cannot recover any part of the mortgaged property, without first paying the amount due on the mortgage. His present claim to eject the Defendant, who is the son of the mortgagee, and probably his representative, must therefore be rejected. The decree of the District Court is accordingly amended, and the claim rejected with costs.

April 16.

Before Mr. Justice Melvill and Mr. Justice Kemball.

DADAJI DATTOO et al (defendants) v. BHASKAR-
RAV BALWANTRAV, deceased, his heir and grand-
son Venkatrav Bhagwantrav (plaintiff) Res-
pondent. †

Estoppel—Party to agreement.

A party to an agreement who accepted from the other side an annuity in consideration of the abandonment of his Patelki and thereby

• Appeal No. 312 of 1877 (p. 63 of P. J. 1878.) •

† S. A. 37 of 1872 review (p. 64 of P. J. 1878.)



taken the benefit of the same, cannot be allowed to repudiate their liability under the agreement.

When this appeal was first heard by another Division Bench of this Court, the case was argued and decided solely on one ground, viz., that the Exhibit No. 10 was, on the face of it, not an absolute grant in perpetuity, but a lease for the lives of the grantors. The case has now been re-heard, and the various other questions, which arise in it, have been argued and considered; and we have come to the conclusion that, assuming that the Exhibit No. 10, if considered by itself, and without reference to surrounding circumstances, ought to be construed as a lease, operating only during the life-time of the lessors, yet in practice, and for a great number of years, it has received a wider construction from the parties interested, and in one instance from a Court of Justice: and further that this wider construction has been acted upon by the present Defendants themselves in such a manner as to estop them from now disputing it. It appears that the question whether Exhibit 10 was binding upon him was fought out by Dattoo, the father of the Defendant No. 1, in 1841-42, in a suit brought by him against the present Plaintiff Bhaskarrav: and in that suit a judgment (Exhibit 9) was passed in which it was distinctly held that Exhibit 10 was binding upon Dattoo. In the justice of that judgment Dattoo acquiesced: and shortly afterwards he executed in favour of the present Plaintiff the document Exhibit No. 11, in which he acknowledged that Exhibit 10 was binding upon him and promised to abide by its terms. To this promise he seems to have adhered: for Exhibit 186 shows that up to his death he regarded the Plaintiff as having power to appoint the officiating patel and himself accepted nomination from him. It has been argued that Dattoo was only a life-tenant, and that, therefore, the present Defendants are not bound by anything which he did. That may be so, though we are far from deciding that it is so. It is possible that the Defendants might, but for their own conduct, have repudiated the Exhibit No. 10 as not binding upon them. But the question is whether they have not, equally with Dattoo, acquiesced in, and acted upon, the Exhibit No. 10 to such an extent that they cannot now repudiate it. We

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think that the District Judge was justified in finding that they have done so. It appears that the Defendants have all along received from the Plaintiff Rs. 25 per annum ; and the District Judge has held, (and we think rightly), that this payment can only be referred to Exhibit No. 10, and and that it represented the annuity payable under that agreement in consideration of the abandonment of the patelki to the Plaintiff. The Defendants have not attempted to show that any such payment was made to their family previously to the Exhibit No. 10, or that it was due to them on any other account than by virtue of that agreement. It appears to have been received by them even during the years 1862 to 1864, when an outsider, and not one of the Defendants, had been appointed by the Plaintiff to officiate as patel. Having therefore accepted from the Plaintiff the annuity stipulated for in Exhibit 10, and thereby taken the benefit of that agreement, they cannot now be allowed to repudiate their liability under the agreement. As against the present Defendants the Plaintiff must be held entitled to the patelki rights mentioned in Exhibit No. 10.

We do not see why we should not give the Plaintiff a declaratory decree to that effect. The Revenue Commissioner has himself referred the parties to a Civil Court, and it is therefore probable that the declaratory decree of this Court will enable the Plaintiff to obtain consequential relief from the revenue authorities. The case of Ningangavda *vs.* Satyangavda ¹ is an authority for holding that under such circumstances, a suit for a declaration will lie.

The question of limitation has been much argued : but under the view which we have taken, viz., that up to the year 1865, the Defendants were acquiescing in, and acting upon, Exhibit No. 10, there was no adverse possession up to 1865, and as the suit was brought in 1869, it is not barred.

We confirm the decrees of the Courts below with costs on Defendants throughout.

(1) 11 B. H. C. 232.

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*Before Sir Michael Roberts Westropp, Kt., C. J. and Mr.
Justice Pinhey.*

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June 11

**HARI RAGHUNATH (plaintiff) Appellant v. RAMJI
ABAJI (defendant) Respondent. ***

*Registration—Priority—Subsequent mortgage registered
before prior mortgage—Bom. Reg. IX of 1827, S. 6
cl. 1—Act I of 1843—Act XIX of 1843—Act
XVI of 1864 Ss. 1, 4 and 67—Maintenance,
right to.*

A mortgage deed executed in 1864 and registered prior to the passing of Act XVI of 1864 invalidates a prior mortgage of the same lands executed in 1862 and registered subsequently ; S. 67 of Act XVI of 1864 being controlled by Ss. 1 and 2 which have the effect of maintaining Bom. Reg. IX of 1827, S. 6, cl. 1 and Acts I and XIX of 1843 in force so far as regards instruments registered under them.

This is an Appeal from the decision of the Acting Assistant Judge of the District of Poona in Appeal No. 46 of 1877.

The Court varies the decree of the Assistant Judge of the 19th September 1877 by declaring that, so far as the lands in the plaint mentioned are included in the mortgage (Exhibit No. 17) of the 29th June 1864, the mortgage (Exhibit 3) of the 1st January 1862 is, under and by virtue of Regulation IX of 1827, Sec. VI, Cl. I ; Act I of 1843 and Act XIX of 1843, invalid as against the said mortgage (Exhibit 17) of the 29th June 1864, inasmuch as it was registered previously to the passing of Act XVI of 1864 and also previously to the registration under that Act of the said mortgage (Exhibit 3) of the 1st January 1862—section 67 of the said Act XVI of 1864 being controlled by Sections 1 and 2 of the same Act, which have the effect of maintaining the said Regulation IX of 1827, Sec. VI, Cl. 1, and Acts I and XIX of 1843 in force so far as regards instruments registered under them. See also Parshotam Ranchod *vs.* Jagjivan Mayaram, 1. But this Court further declares that, if there be any portion of the lands or other property, in the plaint mentioned, which is not included in the said mortgage (Exhibit No. 17) of the 29th June 1864 to the Defendant Ramji bin Abaji, such portion only not so included in that

* Appeal 72 of 1878 (p. 122 of P. J. 1878.)

1 Bom. H. C. R. 60

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mortgage is subject to the mortgage to the Plaintiff (Exhibit No. 3) of the 1st of January, 1862. And this Court decrees that, if the Defendants 1, 2, 3 and 4, namely, Bajya Gangaji alias Bayaji Gangaji, Gaja Limba, Ganu Limba and Saghuna kom Bhawani do not within six calender months from this 11th day of June 1878 pay to the Plaintiff Rs. (794) seven hundred and ninety-four and the costs hereinafter directed to be paid by them to the Plaintiff, the said mortgage (Exhibit 3) of the 1st of January 1862 shall be for ever barred and foreclosed so far only as the same relates to the land or other property therein mentioned and not included in the said mortgage (Exhibit 17) of the 29th June 1864, and the said land and other property not so included in the said mortgage of the 29th June 1864 shall be set up and sold by public auction, and after deducting from the proceeds of the sale thereof the proper expenses of such sale, the said sum of Rs. (794) seven hundred and ninety-four and the costs hereafter directed to be paid by the said 1st, 2nd, 3rd and 4th Defendants to the Plaintiff, out of the said proceeds of sale, and the surplus, if any then left of such proceeds shall be paid over to the said Defendants 1, 2, 3 and 4. And this Court directs the Plaintiff to pay to the Defendant No. 5, namely, Ramji Abaji, his costs of the suit and of both appeals : and this Court further orders the said Defendants 1, 2, 3 and 4 to pay to the Plaintiff his costs of the suit only—and this Court lastly orders the Defendant No. 1 (Bajya Gangaji) in the event of the proceeds of sale being insufficient to pay the said sum of Rs. (794) seven hundred and ninety-four to pay to the Plaintiff the balance thereof then remaining due.

June 17

*Before Sir Michael Roberts Westropp, Kt., C. J. and Mr.
Justice Kemball.*

**KESHAV SAKHARAM (plaintiff) Appellant
v. LAKSHMAN SAKHARAM and others
(defendants) Respondents. ***

*Right to sue to set aside an order directing restoration of
property sold in execution to person in possession at
time of sale.*

* Appeal No. 19 of 1877 from order (p. 123 of P. J. 1878.)

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No suit will lie by the purchaser at an execution sale of a share in ~~inam~~ land to set aside an order directing restoration of possession of the lands sold to the person, not being the judgment-debtor, who has been dispossessed on the purchaser's application. The proper course for the purchaser (plaintiff,) is to bring a suit for partition against such person or persons as might be judgment-debtor's co-parceners in the land joining with them as co-defendants such other persons, if any, who claim to hold the land independently of any estate or interest of the judgment-debtor therein.

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This is an Appeal from an order of the First Class Subordinate Judge of Satara, dated 11th September 1877.

The Plaintiff claims as purchaser at a judicial sale of a fifteenth share alleged to belong to one Gopal Hybatrav in certain inam land. The Plaintiff obtained a certificate of sale on the 29th January, 1874, and possession was given to him by order of the Court of Rahimatpur (in which the sale was made) on the 18th July, 1874. Subsequently, the present Defendants, who had under that order been put out of possession of that share, brought to the notice of that Court that Gopal Hybatrav had not, at the time of the sale or order for possession, been in possession of any portion of the lands, and the same Court, on the 6th of January, 1875, directed restoration of the possession to the Defendants. The Plaintiff has brought the present suit to set aside that order of the 6th January, 1875. On grounds, which it is unnecessary for us now to consider, relating as they did to the stamping of the plaint and the jurisdiction of the Courts of the First Class Subordinate Judge of Satara and the Second Class Subordinate Judge of Rahimatpur, those Courts have respectively rejected the plaint.

We are of opinion that a suit to set aside such an order will not lie, and that the proper course would be for the Plaintiff to bring a suit for a partition against such person or persons as may be co-parceners of Gopal Hybatrav in the land, joining with them as co-Defendants such other persons, if any, who claim to hold the land independently of any estate or interest of Gopal Hybatrav therein (see as to partition Udaram Sitaram vs. Ranu Panduji,, 1 On this ground we must dismiss this appeal with costs.

(1) 11 B. H. C. Rep., page 76.



*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Kembell.*

**MAHARANA SHRI JASVATSANGJI FATESANG-
JI, minor by his guardian mother BAI SHRI
HARIBA (plaintiff) Appellant v. the Collect-
or of Ahmedabad (defendant) Respondent. ***

*Boundary Commissioner's decision, Finality of—Bom.
Reg. X of 1827, s. 14.*

The decision of the Boundary Commissioners appointed under Bom-Reg. X. of 1827 settling a question of disputed boundaries between two villages in a proceeding to which the Government are not parties, is not final and conclusive as between the Government and the owner of villages when a dispute arises on a question of assessment. The finality spoken of in S. 14 of Bom. Reg. X. of 1827 is a finality for the purposes of the Regulation, amongst which purposes the assessability or extent of the assessment of land for Government revenue was not in any wise included.

This is a Special Appeal from the decision of the Acting District Judge of Ahmedabad, in Appeal No. 76 of 1876.

The decision of the Bombay Commissioners, appointed under Regulation X of 1827, comprised two lots of land, each of which, in the proceedings before those Commissioners, was claimed by the inhabitants of Vaghad, who alleged that they represented the village of Piparali. One of those lots the people of Vaghad asserted to belong to the village of Piparali and to have been encroached upon by, and to be in the possession of, the Thakur of Limri ; and the other of those lots the inhabitants of Vaghad asserted also to belong to Piparali, but to have been encroached upon by, and to be in the possession of Alambhai Buddamiya of the village of Patna. The Commissioners awarded, by their judgment, both lots of land to the inhabitants of Vaghad on the ground that those lots belonged to the village of Piparali, and that the people of Vaghad then represented the village of Piparali.

The observation of Couch, C. J., in *Bapuji Balwant vs. Raghunath Vithal* (1) echoed by West, J., in *Pitambar Dhari vs. Sambhajirav* (2) with reference to Bombay Act

* S. A. 228 of 1877 (p. 124 of P. J. 1878.)

(1) 6 Bom. H. C. R. 72, A. C. J. (2) 8 Bom. H. G. R. 185, A. C. J. .



11 of 1866, that "it is not easy to say what is a boundary dispute," is true, but it is quite clear that the claim of the ¹⁸⁷⁸ ~~MAHARANA SUREI~~ ^{JASVATSANGJI} Vaghad people was in fact no mere boundary question, but ^{THE} ~~THE~~ ^{COLLECTOR} an attempt to recover a very considerable tract of land in the ^{OF AHMEDABAD.} case of each lot, and was substantially in the nature of an action of ejectment. and that the decision of the Commissioners, in favour of the claim, really operated as a judgment in ejectment against the Thakur of Limri and Alambhai Buddamiya and the persons claiming under them respectively. The fixing of the boundary marks was merely an ancillary proceeding.

The whole of the decision of the Commissioners was under Section 15 of Reg. X of 1827 open to appeal. Separate petitions of Appeal No. 31 of 1864 and No. 36 of 1864 were presented by the Thakur of Limri and Alambhai Buddamiya of Patna to the District Judge of Ahmedabad. He affirmed the decision of the Commissioners ; but Special Appeals Nos. 202 and 200 were presented to the High Court in 1865 by the same Appellants respectively. Looking at the decree made in either one only of those special appeals, the decision of the Commissioners might perhaps *prima facie* appear to be only partially reversed, but when the decrees made in both of these special appeals are taken into consideration, it is manifest that the intention of the High Court was to reverse the whole of the decision of the Commissioners and to leave no part of it standing. We had hoped that this was explained in the subsequent Miscellaneous Appeal No. 2 of 1874 on the 30th September, 1875, (printed Judgments of 1875, page 270), but our observations, it would seem, were not sufficiently clear to convey our view to the learned Judges in the Courts below in the present cause. We said, —“ The peculiar wording of this Court's decree, with regard to encroachment, was due to the circumstance that there were two appeals from the decree of Mr. Down ; one by the Patna people, and the other by the Limri people, and it was necessary to place both sets of Appellants in the same positions, which they respectively occupied before the placing of the japti on the lands in dispute and before the judgment of the Boundary Commissioners : this Court being of opinion that the Talukdar and people of Vaghad had, on the ground



1878 of limitation, failed on *the whole* of their claim." The curial part of the decree in Special Appeal 202 of 1865 ran thus :—"The Court reverses the decree of the District Judge and the judgment of the Commissioners, so far as they severally award to the Respondents in Special Appeal any portion of the land claimed by the said Respondents as having been wrongfully encroached upon by the Thakur of Limri or those acting under him, with costs." The curial part of the decree in Special Appeal 200 of 1865 was as follows: "The Court reverses the decree of the District Judge and the judgment of the Commissioners, so far as they severally award to the Reapondent in special appeal any portion of the land claimed by the said Respondents as having been wrongfully encroached upon by the special Appellant Alam-bhai Buddamiya of Patna or those acting or claiming under him, with costs." It was impossible that the Limri people and the Patna people could respectively be placed in the same position in which they stood before the placing of the japti on the lands in dispute and before the judgment of the Boundary Commissioners without the complete reversal of that judgment. So far as Limri was concerned, that Judgment was reversed by the decree in Special Appeal 202. So far as Patna was concerned, the judgment was reversed by the decree in Special Appeal 200. The High Court was of opinion that, on the ground of limitation, the Vaghad people had failed on the whole of their claim, and the two decrees were intended to give effect to that opinion. If the Vaghad people, or the Piparali people through whom the Vaghad people claimed, ever had any title to the lands in dispute, they had lost it by their *laches*, and, having lost it, the object for fixing the boundary stones in the manner prayed for by the Vaghad people had ceased to exist. It must be remembered that Government was not a party to, or in anywise represented at, the dispute before, or the investigation by the Boundary Commissioners. The fixing of the boundary stones was a matter which concerned the parties alone. We must hold, accordingly, that no part of the judgment of the Commissioners remained in force after the making of the decrees in Special Appeals Nos. 200 and 202 of 1865.



Even, however, if that judgment remained in force so far as regards the boundary stones alone, we are unable to perceive how it could conclude the Appellant (the Thakur of Limri) in this present suit. As already observed, Government was not a party to the proceedings before the Boundary commissioners, there was not any question of assessment before them, and they had not, if such a question had been raised, any jurisdiction to decide it or to affect such a question by their award. Assuming that the boundary was correctly laid down by the Commissioners as between the parties then before them, it does not necessarily thence follow that it was so as between Government and the Thakur of Limri and his sub-tenants. It may well be that, for the purpose of assessment, the lands have, either by long usage, or by agreement, or acquiescence, as between Government and the Thakur of Limri, been treated as part of the village of Soodriana, and not regarded as part of Piparali or, at all events, as subject to the lump assessment only. We do not intend now to offer any opinion as to whether that was the real state of facts. That question must be the subject of a new trial. It is sufficient for us to say that, notwithstanding the temporary assumption, for the purpose of argument only that, as between Limri and Piparali, the Commissioners' boundary was correct, it is not an inevitable consequence flowing thence that the same boundary governed the question of assessment. The finality spoken of in section 14 of Reg. X of 1827 is a finality for the purpose of that regulation, amongst which purposes the assessability or extent of the assessment of land for Government revenue was not in anywise included. We reverse decrees of the Courts below and remand this cause for re-trial on the merits. The costs of this Special Appeal must abide the final result of the cause.

*Before Sir Michael Roberts Westropp, Kt., C. J.
and Mr. Justice Kemball.*

July 1.

GANESH and GOPAL BAGAJI (defendants) Appellants v. YAMUNABAI GOVIND (plaintiff)
Respondent. *

* S. A. 331 of 1876 (p. 130 of P. J. 1878).

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BOMBAY HIGH COURT

1878

**GANESH
v.
YAMUNABAI.**

Hindu Law—Maintenance of widow. right to, where no ancestral property.

A Hindu widow is not entitled to maintenance from her husband's relatives where there is no family property and where the widow herself has taken any property which her husband left.

This is a Special Appeal from the Decision of the Joint Judge of the District of Tanna, in Appeal No. 422 of 1875.

The Defendants have paid in the Court of the Joint Judge a sufficient additional fee to cover the objection to the whole amount of maintenance awarded, and in their written statement (originally filed in defence) did deny altogether their liability to maintain the Plaintiff. The Joint Judge has found as a fact that the Defendants themselves have not any means of subsistence except their salaries. They appear to be Brahman schoolmasters. There not being any family property, and the Plaintiff having herself taken any property which her husband left, the Full Bench decision in Savitribai vs. Lakshmibai and Sadasiv 1 is applicable. We must, therefore, vary the decrees of the Courts below by directing the omission therefrom of the order that the Defendants should pay to the Plaintiff Rupees (3) three per mensem for maintenance. The Plaintiff must pay to the Defendants the costs of the suit and of both appeals, so far as the same relate to maintenance, and the Defendants must pay to the Plaintiff all other costs of the suit and of both appeals.

July 8.

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Kemball.*

**SAKHARAM GOVIND (defendant) Appellant v.
JANKIBAI widow of RAMCHANDRA KRI-
SHNA (plaintiff) Respondent. ***

*Hindu Law—Alienation by widow of widow's estate—
maintenance.*

A Hindu widow may sell her widow's estate in her husband's property whether it be for the payment of her husband's debts or for her own maintenance or not, and she may sell his property and make a complete title to it against his heirs, if it be necessary to do so for payment of his debts and to provide for her own maintenance.

* Appeal No. 301 of 1877 p. (139 of P. J. 1878.)
(1) 2 Bom. 573.

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A Hindu widow is not entitled to maintenance from her husband's relatives who are not in possession of her husband's property or other property belonging to the family which is liable to her for her maintenance.

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v.
JANKIBAI.

This is an Appeal from the decision of the Acting District Judge of Ratnagiri in Appeal No. 89 of 1877.

The Plaintiff has sued her husband's great nephew for maintenance. There is not any finding by either of the Courts below as to whether or not her husband was separated from the Defendant as regards estate. The circumstance, however, that she was left in exclusive possession of the estate held by her husband and was treated by the Defendant as competent to dispose of it, as she did by conveying it to him by deed (Exhibit 11), dated Jeth Vad 10th, Shaka 1782 (14th June, 1860), would rather tend to the inference that they were divided. We do not, however think that to be a circumstance of importance, as there cannot be any doubt that she did then sell all her estate and interest in the land to the Defendant for a full and valuable consideration, viz., Rs. 800, which it has been proved to the satisfaction of both of the Courts below that she received. Of this sum Rupees 550 were paid to her to enable her to discharge debts due by her husband and a further debt due by herself incurred in respect of the marriage of her daughter, and Rupees 250 to be invested by her at interest for her future maintenance. Her plaint was completely silent as to this sale to the Defendant. When it was pleaded by Defendant, she pretended that she had received Rupees 400 only of the consideration of Rupees 800. It was, however, proved, beyond question to the satisfaction of both of the Courts below, that she received the full consideration of Rupees 800. The Subordinate Judge further found that she had still sufficient means to live upon and decreed against her. The District Judge appears to have thought the evidence insufficient to prove that she still had enough to live upon, and awarded her Rupees 2 per mensem to be paid by the Defendant, who has appealed to this Court.

It is to be observed that the Plaintiff has not ventured to assert that Rupees 800 were not the full value of the immoveable property sold by her to the Defendant, or that the



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SAKHARAN
v.
JANKIBAI.

transaction was in any respect unfair, or that any undue advantage was taken of her. And it is not likely that Rupees 800 were not the full value of the land, seeing that, although part of it was garden land, and part it was rice land, the whole of it was less than two bighas. The transaction seems to have been one for the purpose of relieving her from the embarrassment in which she was involved and of keeping up the credit of the family, as is recited in the deed which she executed. It is not, we think, open to the Plaintiff to contend that she (the vendor) was not competent to sell. There cannot be any doubt that a Hindu widow may sell her widow's estate in her husband's property, whether it be for payment of her husband's debts and for her own maintenance or not—2 Bom. H. C. R. 313, 2nd Ed.; 8 Ibid. 37, A. C. J.; 2 Madr. H. C. R. 393; 1 Calc. W. R. 47, 69; Ind. L. R.. 1, Bom. 577; L. R. 2 Ind. App. 275. And further she may sell his property and make a complete title to it against his heirs, if it be necessary to do so for payment of his debts and to provide for her own maintenance—1 Stra. H. L. 246, 247; Mayukha Ch. V, S. 4, pl. 17, 20; 1 Dig. Bk. 1, Ch. V, cl. XXI, Comm.; 2 Stra. H. L. 280, 281, 282; 1 Morris S. D. R. 184; 1 Borr. 455; 2 Borr. 127, 223, 362. There is not an iota of evidence or any reason to suppose that the lands sold by the Plaintiff to the Defendant were worth more than what she obtained from the Defendant for them, and we are unable to see that she has any claim for maintenance against the Defendant whom she has sought to charge here with it, simply because he is in possession of the lands which she has sold to him for what she does not deny to be their full value. She does not assert that he is in possession of any other property of her husband or belonging to the family which is liable to her for maintenance. Under such circumstances, we do not see how, consistently with the principles which governed the recent decision of a Full Bench of this Court in Savitribai vs. Laxmibai and Sadashiv Ananta, (1) she can maintain this suit.

The Plaintiff has not even alleged that the Defendant is the nearest surviving male relative of her husband. She

(1) Bom. 573.



seems for many years to have resided with her own brother (one of those creditors of her husband who have been paid off out of the Rs. 800 received by her from the Defendant), but to have been maintained out of her own resources.

We, being of opinion that the Defendant has not taken the land in any other capacity than as purchaser, and that it is not liable in his hands to the Plaintiff for her maintenance, reverse the decree of the District Judge and restore that of the Subordinate Judge, except as to costs. The Defendant's pleader, very much to the credit of the Defendant, not pressing for costs, we direct that the parties respectively bear their own costs of the suit and of both appeals.

*Before Sir Michael Roberts Westropp, Kt., C. J.
and Mr. Justice Kemball.*

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SAKHARAM
V.
JANKIBAI.

July 22.

**RAMCHANDRA MANKESHWAR (plaintiff) Ap-
pellant v. MALHARI ISHWARA (defendant)
Respondent. ***

*Mortgage, sale in execution of a decree on—Priority—
Registered mortgage—Prior sale in execution of
money decree against mortgagor.*

A purchaser of property in execution of a decree on a registered mortgage has a lien and title thereto prior to that of a purchaser of the same property in execution of a money decree obtained after the date of the mortgage.

This is an Appeal from the decision of the Assistant Judge, F. P., of the District of Poona, at Sholapur, in Appeal No. 183 of 1876.

The Plaintiff's title to the northern half depends upon a registered mortgage for Rs. 90 from Narsu (the owner of that half), dated 3rd May, 1869, and upon a decree for sale of that half, founded on the same mortgage, and made on the 20th June, 1873, in Suit 388 of 1873. The Defendant, it is true, obtained a personal decree against Narsu on the 19th July, 1872, but that was merely a money decree and gave him no lien upon the land, and eventually under an execution issued upon that decree, he purchased the northern half on the 26th September, 1874. The sale to the Plaintiff on his mortgage decree of the 20th June, 1873, did not take

° Appeal No. 360 of 1877 (p. 156 of P. J. 1878.)



1878
BAMCHANDRA. place until the 14th January, 1875, but his registered mort-
v. gage of 1869 and his decree of 1873 gave him a lien and
MALHARI, title prior to the title of the Defendant to the northern
half.

The Plaintiff has failed to prove any title either in Narsu or himself in the southern half.

We vary the decrees of the Courts below by directing that the Plaintiff do recover the northern half only of the property in the plaint mentioned. The Plaintiff to have his costs throughout from the Defendant in respect of the northern half, and the defendant to have his costs from the Plaintiff throughout in respect of the southern half. In all other respects the decrees of the Courts below to stand affirmed.

July 22.

Before Mr. Justice West and Mr. Justice Pinhey.

MADHAVRAV JANARDAN (plaintiff) Appellant v.

NANA RAVJI (defendant) Respondent. *

Appeal, second—Evidence.

A judgment is erroneous if the case is disposed of not on the evidence as a whole but on the portion of it and on a supposition on this part of the Judge that there was no more evidence.

This is an Appeal from the decision of the District Judge of Satara, in Appeal No. 186 of 1877.

The land in dispute, as the District Judge finds, is identical with land which the Plaintiff's vendor obtained (A. D. 1830) under the document No. 32. It is now in the possession of Nana Ravji, but Nana's possession is accounted for by the kabulayat No. 15, by which, if it be genuine, Ravji constituted himself the tenant of Janrav, the vendor, if Janrav is the same person as Aba Saheb. The District Judge says there is " no proof of who Aba Saheb is except what Janrav says " but witness No. 17 speaks of Janrav urf Aba Saheb. The kabulyat of 1837 from Joti bin Subhana is, if it be proved, addressed to Janrav Aba. The document No. 15 now sued on was in Janrav's possession and filed according to an endorsement in a former suit, a circumstance which would in some measure corroborate direct evidence that Janrav and Aba Saheb were one and the same person.

* Appeal No. 71 of 1878 (p. 164 of P. J. 1878.)

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The judgment, therefore, is erroneous in disposing of the case not on the evidence as a whole on this point but on a portion of the evidence, the District Judge having supposed there was no more. We must in consequence reverse his decree and remand the cause for retrial and a new decision on the whole of the evidence. Costs to follow the final decision.

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**MADHAVRAV
v.
NANA.**

Before Mr. Justice West and Mr. Justice Pinhey.

July 23.

**GODAVARI BAI, Saheb, widow of GANGADHAR-
RAV MAHADEVRAV (Intervenor) Appellant
v. UMABAI Saheb, widow of KHANDERAV
GANGADHARRAV (Applicant) Respondent. ***

Act XX of 1864, s. 6—Procedure.

In inquiries under S. 6 Act XX of 1864 the Court is not bound to hear as a suit every application in opposition to the person apparently fit to be appointed guardian of a minor.

This is an Appeal from an order of the District Judge of Poona in application No. 73 of 1878 under Act XX of 1864.

The minors' Act XX of 1864 provides for two classes of cases. In the one the person proposed as administrator has been named by a will or is a near relative. In the other these conditions do not exist. In the former case the Court may appoint the person duly designated or the relative to be a guardian as well as administrator. In the other case to which sections 8, 9 and 10 of the Act apply, somewhat different rules are prescribed and for obvious reasons, as those sections are applicable only to cases in which no near relative can be found willing and fit for the duties of administration. In the former case the inquiry is not essentially of a litigious character; the Court may inform itself by the best means available of the character and qualifications of the proposed administrator or guardian, and may call on the Collector for a report on those points. This mode of ascertaining the fitness of an intended guardian does not pre-suppose but rather excludes a forensic contest in which rival candidates for the office would disparage one another and perhaps stir up ill-feeling between the ward and the person ultimately appointed guardian. The District Judge, there-

* Appeal No. 1 of 1878 (p. 166 of P. J. 1878.)



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GODAVARI
UMABAI.

fore, is not bound to hear as a suit every application in opposition to the person apparently fit to be appointed, and in that sense the Appellant here had not a *locus standi* in the District Court. The District Judge might hear her as he might gather information from any source, but he was not bound to hear her in a litigious proceeding and in open Court. After the appointment of Umabai as guardian, should there be anything which made it desirable to remove her, the Appellant could apply to the District Judge, under section 21, and he would no doubt pay due attention to her representations. If necessary, he would investigate publicly any serious charges against Umabai, but in the meantime he is to exercise his best discretion in choosing or changing the guardian, and is not bound to hear arguments on the subject in open Court which might in so delicate a matter have a very mischievous effect.

We, therefore, confirm his order with costs.

July 29.

*Befor Sir Michael Roberts Westropp Knight., C. J. and
Mr. Justice Kemball.*

MOTABHAI MOTILAL (Opponent) Applicant *v.*
CHANDRASHEKHARAM and CHINTAMANI-
RAM, sons of LALITARAM, *et al* (Applicants)
Opponents. *

*Execution of decree—Attachment of Pension—Civil Pro.
Code. Act X of 1877 s. 266 g.*

Sec. 266 g of Act X of 1877 does not apply to a proceeding the object of which is to give effect to a decree for sale founded on a mortgage.

This is an Application from an order of the First Class Subordinate Judge of Surat in Application No. 1003 of 1877.

The Subordinate Judge, while rightly deciding all other points arising upon the present application in favour of the Plaintiff Motabhai Motilal, has ruled against him on the sole ground that clause (g) of section 266 of the Civil Procedure Code (X of 1877) prevents the Subordinate Judge from acceding to it. Putting aside the question whether a retros-

* Application 82 of 1878 under Extra. Juris. (p. 171 of P. J. 1878.)



pective construction could be given to that section, we hold it to be wholly inapplicable to the present proceeding, the object of which is to give effect to a decree for sale founded upon a mortgage, and not for the attachment of property in ordinary execution. This proceeding rests upon the order for sale contained in the decree to which the plaintiff's mortgage entitled him, and is not anywise founded upon or in virtue of the authority given by section 266 of the new Civil Procedure Code, and, therefore, is unaffected by the exceptions contained in that section. See the analogous decision in *Womda Khanum vs. Rajroop Koer* (1) with respect to section 243 of Act VIII of 1859. The order of the Subordinate Judge must be reversed and the pension must be sold as prayed for in the darkhast No. 924 of 1877.

No appeal lies in such a case as the present, but we have permitted the Plaintiff to amend his proceedings in this Court by altering his memorandum of appeal into an application to the extraordinary jurisdiction of this Court, this appearing to us to be a proper occasion for the exercise of that jurisdiction. Chandrashekhram and Chintamaniram must pay to the Plaintiff Motabhai Motilal the costs of the proceedings in this matter, both in this Court and in the Court below.

1878

MOTABHAI
v.
CHANDRA-
SHEKHARAM.

Before Mr. Justice West and Mr. Justice Pinhey.
VISHNU CHINTAMAN (plaintiff) Appellant v.
ANNAJI PIRAJI and others (defendants) Res-
pondents. *

August 5.

Appeal, second—Evidence—Misconstruction of documents.

Though the application of documents to the physical objects to which they refer is not a matter of legal construction, but rather of the determination of what their abstract sense, when ascertained, embraces as taken along with other guiding indications as placed before the Court, yet the documents as they are, not as they are wrongfully supposed to be, must be thus applied. The mis-reading of a document regarded as a piece of evidence leads the Judge to adjudicate not *secundum probata*, but according to something which is not

(1) I. L. R., 3 Cal., 335.

* Appeal No. 91 of 1878 (p. 177 of P. J. 1878.)



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VISHNU
v.
ANNAJI.

really in evidence, and in doing so falls into an error which will be rectified in second appeal.

This is an Appeal from the decision of the Acting District Judge of Poona, in Appeal No. 51 of 1877.

The District Judge has, it is admitted, fallen into a misapprehension as to the application of the memorandum of sale No. 38 and the memorandum of delivery No. 39 to the land in dispute. Those documents define the two pieces to which they relate as extending southward to the land of Genu and Khandu, i. e., so as to include the land marked red in the plan, which, the district Judge says, was not included in the description given by those documents. They were produced before the Mamlatdar by Sadu, the purchaser, and the statement made before that officer by Annaji and Tukaram as to Sadu's undisturbed possession, should, *prima facie*, be construed as relating to a possession co-extensive with that which they purport to convey to Sadu.

It has been urged that the misconception of the District Judge amounts only to a defective appreciation of the evidence—a matter beyond the cognizance of this Court—but though the application of documents to the physical objects to which they refer is not a matter of legal construction, but rather of the determination of what their abstract sense, when ascertained, embraces as taken along with other guiding indications (as Exhibit No. 4) placed before the Court, yet the documents, as they are not as they are wrongly supposed to be, must be thus applied. The mis-reading of a document regarded as a piece of evidence leads the Judge to adjudicate not *secundum probata*, but according to something which is not really in evidence. In doing this he falls into an error of procedure which, in a case like the present, materially affects the disposal of the case on the merits.

We must, for these reasons, reverse the decree of the District Judge and remand the cause for retrial and a new decision with reference to the foregoing observations. Costs to follow the final decision.



Before Mr. Justice West and Mr. Justice Pinhey.

1878

August 6.

RAVJI RAGHUNATH, deceased, his son and heir,
Vinayak (defendant) Appellant *v.* KAZI SAYAD
GULAMUDIN KAZISAYAD KAMALUDIN
and others (plaintiffs) Respondents. *

• *Endowment—Devasthan, form of grant to.*

A grant expressed as conferring an *inam* to be enjoyed by the two lines of a Mahomedan Pir may yet be an ordinary temple (*devasthan*) grant and not confer a private disposable estate, or one which fails as an endowment on the extinction of the grantees.

This is an Appeal from the decision of the Acting District Judge of Poona, in Appeal No. 258 of 1876.

The main contention on which, in this case, it is sought to upset the decision of the District Court is that the grant being expressed as conferring an inam to be enjoyed by the two lines of descendants from a Mahomedan Pir, that circumstance differentiates it from an ordinary temple grant (*devasthan*) so as to make the property substantially a private estate disposable as to their several shares by the individual co-sharers. A true *devasthan* grant, it is urged, is not limited to a particular family which may become extinct, but is made to the temple as a kind of fictitious person represented from time to time by the proper managers. It is certain that grants expressed in this impersonal way sometimes occur, but it has not been shown that the form is essential to a *devasthan* grant, so that without it the proper characteristics of such a grant cannot subsist. A grant, however impersonally worded, must in fact be from a person to a person; and the expression therefore of this necessary truth cannot on principle alter the nature of such a document. In the present case the Inam Commissioner who was familiar with such documents, found no difficulty in ordering that the inam should be continued "as the inam of the *durga* of Sayad Hisam-ud-din to the male descendants of Fakir and of Kasim and Sileman," and though these descendants may become extinct, and the grant thus fail, that does not, so far as we can see, affect the other condition of the grant that the property is always to furnish the means

• Appeal No. 321 of 1877 (p. 179 of P. J. 1878.)



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RAVJI
v.
KAZI SAYAD
GULAMUDIN.

of defraying the expenses of the durga. It has not been contended that property thus dedicated is alienable by those who, as some human beings must take the profits, are the persons designated for that benefit, or that an attempted alienation by such persons of a part of the endowment, in the advantages of which they share, cannot be effectually resisted by the trustees and managers. That is the place filled by the Plaintiffs in the present case, and we must confirm the decree made in their favour by the District Judge with costs on the appellant.

August 22.

Before Mr. Justice West and Mr. Justice Pinhey.
JANIBAI SAYAJIRAV (defendant) Appellant v.
BABAJI DEVRAYA (plaintiff) Respondent. *

Splitting cause of action—Interest and principal, separate suits for.

There may be cases in which on account of a particular term being stipulated for repayment of the principal and periodical times for payment of interest, each instalment of the interest may be separately claimed apart from the principal, but in the absence of some special circumstances of that kind, interest adheres to the principal, so that no two sums but one sum may properly be claimed, non-payment of which constitutes one, not two causes of action.

This is an Appeal from the decision of the District Judge of Satara in Appeal No. 217 of 1878.

In this case, after the lapse of four years from the date of the loan, the defendant Janibai became answerable for repayment of Rs. (800) eight hundred with interest, and of Rs. (300) three hundred without interest. The Plaintiff Babaji sued her for interest alone, and the District Judge has held that such a suit could be entertained, though the claim for the principal was not relinquished. There may be cases in which, on account of a particular term being stipulated for repayment of the principal, and periodical times for payment of interest, each instalment of the interest may be separately claimed apart from the principal, but in the absence of some special circumstances of that kind, interest adheres to the principal, so that not two sums but one sum

* Appeal No. 187 of 1878 (p. 185 of P. J. 1878.)



may properly be claimed, non-payment of which constitutes one, not two causes of action. Here there were no special circumstances severing the interest from the principal. When the one was due the other was due. They constituted a single debt, and the plaintiff, if he could recover part of that single debt under his plaint in this suit, would be debarred from recovering any other part of it. It is to his advantage therefore that we should, as we now do, pronounce the suit improperly brought for interest alone, and, on that ground, reverse the decree of the District Court with costs throughout on the respondent.

1878

JANIBAI
v.
BABAJI.

Before Mr. Justice West and Mr. Justice Pinhey.

RAMCHANDRA alias Bapu Mankeshvar, deceased,
his sons and heirs Sakharam and Daji, et al
(defendants) Appellants v. GUNWANTRAV
BHAGWANTRAV alias Bapu Sahab
(plaintiff) Respondent. *

August 26.

Limitation — Adverse possession—Mamlatdar's order for possession.

Where the defendant, who was alleged by the plaintiff to be in possession of certain lands as his servant, was ejected by the plaintiff, and sought the aid of the Mamlatdar Court denying the plaintiff's proprietorship altogether, and was restored to "possession as before" :—*held* that from the moment of his restoration he was in possession in absolute contradiction to plaintiff's right, and in no other character than that of owner as against the plaintiff. No relation of trust or landlord and tenant could subsist between them as against the will of both parties. The plaintiff's suit, therefore, to recover possession not having been brought before 1870, was barred by art. 7 of s. 1 of Act XIV of 1859.

This is an Appeal from the decision of the District Judge of Satara in Appeal No. 65 of 1877.

The only ground on which it has been attempted to support the decision of the District Judge is that the defendant's father Ramchandra, having originally acquired possession as a servant or manager, was in the same character when Gunwant ousted him in 1858, and that when he was restored to his "possession or enjoyment as before," he was restored as trustee, so that limitation would not run against

• Appeal No. 214 of 1878 (p. 186 of P. J. 1878.)



*** 1878**
RAMCHANDRA
v.
GUNWANTRAV.

Gunwant assumed for this purpose to have been the original owner. It is clear however that when Gunwant expelled Ramchandra in 1858, Ramchandra could no longer have been his representative as to the possession and enjoyment of this land. Ramchandra seeking the aid of the Mamlatdar's Court denied Gunwant's proprietorship altogether asserting that the land was mere Gulkuli which he had taken up some years before ; and he claimed restoration, not as a servant or agent, which he could not be against Gunwant's will, but in opposition to Gunwant's alleged title. When therefore, he was restored to " possession as before, " that was to possession of the same physical kind as before, namely, a sole and exclusive possession. His occupation of the land as Gunwant's servant would not in fact have been a possession at all as against Gunwant, but merely a custody which Gunwant might determine. It might indeed well be that having a lease or being through some other legal relation entitled to a temporary possession, Ramchandra might have succeeded in the summary proceeding quite consistently with the subsistence in Gunwant of a right to oust him on the expiration of a certain term, and if this had been his case before the Mamlatdar, he could not afterwards withdraw from it. The possession assigned to him would have been a possession in virtue of his temporary title. If to setting up a title of this kind against Gunwant he failed to prove it, he could not then support his claim to possession on some other and inconsistent title. But when having been turned out by Gunwant he sought and recovered possession denying altogether the ownership of his ejector Gunwant, he was, from the moment of his restoration, in possession in absolute contradiction to Gunwant's right, and in no other character than that of owner as against Gunwant. No relation of trust or of land-lord and tenant could subsist between them against the will of both parties. Ramchandra having thus been put into possession, not under Gunwant, or consistently with a reversionary right still vested in Gunwant, the latter, if he had a proprietorship, and a right as land-lord or as master which was wrongly denied, might have sued at once, seeing that Ramchandra could not affirm a holding as servant or as tenant so as to



give him a temporary right, while denying that the land-
lord or master had any right at all. But by Art. 7 of Sec-
tion 1 of Act 14 of 1859 Gunwant was limited to three years
from the date of his dispossession by the Mamlatdar as the
time within which he was to bring a suit to recover pos-
session. Extending this term on account of the Limitation
Acts not being introduced into Satara until 1st January
1863, two years beyond that date the present suit had been
barred for several years before it was brought in Decem-
ber 1870.

We must, therefore, reverse the decree of the District
Court and restore that of the Subordinate Judge with costs
throughout on respondent.

*Before Sir Michael Roberts Westropp, Kt., C. J. and Mr.,
Justice Kemball.*

August 27.

**ABRAHAMJI DAOOJI Applicant v. NATHWA
KALLYA Opponent. ***

Execution of decree against defendant deceased.

There must be some person on record as representative of a deceased
defendant before execution can be had as against the estate which
belonged to him at his decease. If the deceased left no relatives and
made no valid disposition of his property, the crown would be his heir
and under such circumstances his legal representative.

This is a Reference under Section 617 of Act X of 1877
from the Subordinate Judge, Second Class, of Ankleshwar.

Section 234 of the New Civil Procedure Code of 1877 is
constructed from Sections 210 and 211 of the Civil Pro-
cedure Code of 1859, and the new matter relating to the
production of accounts introduced into Section 234 of the
New Code does not affect the present case. It is manifest
from Section 234 that there must be some person on
record as representative of the deceased Defendant before
execution can be had as against the estate which belonged
to that Defendant at his decease. Execution against such
estate cannot be had otherwise, and so it was decided in 1867
under Sections 210 and 211 of the Old Code by the High

(Civ. Ref. 3 of 1878 (p. 190 of P. J. 1878.)



1878
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Court of Calcutta in *Lekraj Roy vs. Becharam Misser*,
(1) If the deceased left no relatives, and made no testamentary or other valid disposition of his property, the crown would be his heir, and therefore under such circumstances his legal representative. Doubtless cases would and do sometimes arise when some person or persons being neither heirs nor devisees of the deceased defendant have without title possessed themselves of his property, and therefore occupy a position similar to that in England held by an *Executor de son tort*. Possibly the proper course under such circumstances would be to place on record both the legal heir or other representative and the person in possession of the property of the deceased with a statement of the fact and circumstances of such possession. However it will be sufficient time to decide this question when raised before us, which it is not on the present occasion.

August 28.

*Before Sir Michael Roberts Westropp, Kt., C. J.
and Mr. Justice Kemball.*

NARAYAN BHAU SHET (Plaintiff) Appellant v.
MARUTI RUPAJI (defendant) Respondent.*

Mortgage—sub-mortgage, Redemption without notice of.

The redemption of a mortgage by the mortgagor without notice, *i. e.* without knowledge of the existence of a sub-mortgage is good against submortgagee. Possession by the submortgagee of a part of the mortgaged property ought, however, to have put the mortgagor on inquiry as to the submortgagee's title.

This is an Appeal from the decision of the Acting District Judge of Poona, in Appeal No. 238 of 1877.

The case of the Plaintiff as alleged is, that Kushaba in A. D. 1838, mortgaged the house, the subject of the plaint, for Rs. 101 to Ravji under Exhibit No. 22; that Narayan son of Ravji sub-mortgaged it, A. D. 1863, for Rs 50 to Sakharam, under Exhibit No. 23 ; that Ganu (son of Kushaba, the original mortgagor) on the 27th November, 1865, executed a mortgage (Exhibit No. 25) for Rs. 175 to Sakharam whereupon the mortgage of 1838 to Ravji and the sub-mortgage of 1863 to Sakharam were redeemed and satisfied, and the

(1) 7 Calc. W. R. 52 Civ. R.

* Appeal No. 240 of 1878 (p. 201 of P. J. 1878.)

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Exhibits Nos. 22 and 23 were accordingly made over to ganu; that Ganu, on the 6th of May, 1876, (erroneously written by the District Judge 1866) by deed (Exhibit No. 3) sold the house to the plaintiff (Narayan Bhaushet) for Rs. 275 and then paid Rs. 175 out of that some to Sakharam in redemption of his mortgage of 1865, Exhibit 25, which exhibit was then restored to Ganu.

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**NARAYAN,
v.
MABUTI.**

The defendant Rupaji denied the title of Ganu, and therefore, that of the plaintiff (who claims under Ganu), and, treating Sakharam as owner of the house, alleges two mortgages from him to defendant Rupaji. The earlier of these two mortgages is mentioned in Exhibit 27, a kararnama produced by Rupaji, but is there stated to have been redeemed and destroyed and is therefore out of the case. That kararnama, executed by Sakharam, permits Rupaji to occupy as tenant for seven months ; but Rupaji alleges that, before the expiration of that time, Sakharam executed to him, on Magh vad the 2nd, Shak 1787 (1st February 1866), a new mortgage of half of the house for Rs. 300. That mortgage has not been produced, but a decree (Exhibit 10) in a suit by Rupaji against Sakharam, founded on the alleged mortgage of the 1st February, 1866, has been given in evidence, and under that decree Rupaji alleges that half the house in question was sold to him (Rupaji) and that he is entitled to hold the same as purchaser against the plaintiff whose title, as already stated, he denies. The other moiety of the house was sub-mortgaged by Sakharam to Hindu Asaji. The Plaintiff is now in possession of that moiety having come to an arrangement with Hindu Asaji. The Plaintiff, in his alleged capacity of original mortgagor to Sakharam, demands that Rupaji should be put on proof of his title as mortgagee from Sakharam and also as purchaser. The alleged mortgage by Sakharam to Rupaji of the 1st February, 1866, has not been produced, and its absence has not been accounted for so as to admit secondary evidence of it. The decree (Exhibit 10) being in a suit to which Ganu was not a party, neither bound Ganu, nor the plaintiff, who claims under him, and although there is upon that decree an indorsement relating to the alleged judicial sale to Rupaji, no certificate of such sale has been produced, and if any such certificate

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were given, it is impossible to say whether or not it was registered.

The District Judge, although apparently inclined to believe that Sakharam had no higher title than that of mortgagee, has not come to any positive finding on that question. He should have ascertained whether Ganu executed Exhibit No. 25 to Sakharam in 1865. If that were a genuine instrument, it is clear that Rupaji, if the alleged mortgage of the 1st February, 1866, were really executed in his favour by Sakharam, stood, at the utmost, in no higher position than that of sub-mortgagee when he obtained his decree (Exhibit 10), and, if there were a sale to him under that decree, could have taken under such sale no better title than Sakharam had, and would, therefore, be liable to redemption at the suit of the plaintiff as assignee of the estate and interest of Ganu in the house.

The District Judge says that this not being a suit for redemption, but of ejectment, the plaintiff ought not to be permitted to redeem the land by the present proceedings. The learned Judge, however, seems to have overlooked the circumstance that the plaintiff alleges that the house has been redeemed at or about the time of the sale to the plaintiff in 1876 by Ganu from Sakharam. The payment made to Sakharam would be good and would bind the defendant Rupaji, as sub-mortgagee, if Ganu had not then notice, i. e., knowledge of the sub-mortgage by Sakharam to Rupaji : *Matthews vs. Wallwyn* 1 ; *Jones vs. Gibbons* 2 ; *Fisher on Mortgages*, 2nd ed., p. 589, note (x).

Whether or not Ganu had such notice is a point to be decided in the District Court. We would, however, point out in aid of that Court that, in Exhibit 3 (the conveyance by Ganu to the plaintiff) Rupaji is recited to be in possession of the moiety of the house, but without title. If Rupaji were in possession at the time of the redemption from Sakharam, the fact of such possession ought to have put Ganu on inquiry as to Rupaji's title, and he ought to have taken proper steps to inform himself as to it. The recital would tend to show that some inquiry was made, but it will be for the District Judge

(1) 4 Vesey, 118, 127.

(2) 9 Vesey, 410.



to ascertain whether or not Ganu and the plaintiff had good and sufficient reason for concluding that Rupaji had not a valid title.

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v.
MARUTI

The forgoing remarks shews that this case needs further investigation, and we, therefore, reverse the decree of the District Judge, and remand the cause to him for retrial on the merits. He may take such further evidence, oral or documentary, as may be necessary and lawfully admissible. He should ascertain whether Sakharam was only a mortgagee from Ganu. If the District Judge determine this point in the affirmative, he must treat Rupaji as merely a sub-mortgagee. If (as is perhaps improbable) Ganu when paying off Sakharam had no knowledge of Rupaji's title, that payment must be treated as binding on Rupaji.

The District Judge must ascertain whether Rupaji, at the time of the sale to plaintiff, was a *bona fide* sub-mortgagee, and if this point be determined in the affirmative, and that Ganu knew, or by taking proper steps might have known of Rupaji's title previously to paying off Sakharam, Rupaji is entitled still to be so regarded, and the plaintiff could not recover the moiety of the house in Rupaji's possession without redeeming that moiety from him. We are inclined to think that in such case, the plaintiff ought to be permitted to redeem Rupaji in this suit; for which purpose an account should be taken of what balance is due to Rupaji on the alleged mortgage of the 1st February, 1866. (The plaintiff would not however in respect of such balance be bound to pay by way of redemption money to Rupaji more than half the amount of the claim of Sakharam, the original mortgagor, against Ganu—a moiety only of the house having been mortgaged to Rupaji by Sakharam); and in such case the plaintiff ought to pay the costs of the suit and of both appeals.

If, however, Sakharam were only a mortgagee from Ganu, and Rupaji were a *bona fide* sub-mortgagee from Sakharam, and Ganu paid Sakharam off without notice or the means of knowing of Rupaji's sub-mortgage, the plaintiff should recover the premises without any payment to Rupaji; but, under those circumstances, the parties respectively should bear their own costs of the suit and of the regular appeal,



1878 and Rupaji should be only required to pay to the plaintiff
the costs of this second appeal.

NARAYAN

MARUTI.

If it turn out that Rupaji had no title, and that Sakhar-
am was a mortgagee from Ganu, the plaintiff should recover
the moiety of the house and all costs of suit and both appeals
from Rupaji.

Lastly, if Sakhar-
am were not a mortgagee from Ganu i. e.,
if Ganu had no title, there should be a decree with costs
throughout against the plaintiff.

September 2.

Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Kembell.

MANAKCHAND PURSHOTAM and others (defend-
ants) Appellants v. NATHU PURSHOTAM
(plaintiff) Respondent. *

*Costs—Partition suit—Hindu Law, undivided family—
Unequal distribution of ancestral property.*

The general and proper rule in a partition suit is that the costs of all
proper parties should be borne by the estate, unless the conduct of a
party should be so objectionable as either to justify his being deprived
of his costs or ordered to pay those of one or more of the other parties.

A father has no testamentary power to make unequal divisions of the
ancestral moveable estate amongst his sons.

This is an Appeal from the decision of the first Class
Subordinate Judge at Nasik, in Original Suit No. 227
of 1876.

The Defendants' learned pleader has, in argument, relied
only upon the points in his memorandum of appeal lettered
respectively (i), (j), (n), and (o). As to (i) we do not under-
stand the decree of the learned Subordinate Judge as neces-
sarily bearing the meaning attributed to it in point (i) with
respect to the house property, nor does the Rav Saheb Vi-
shvanath Narayan Mandlik contend that such is the mean-
ing of it. Under the decree, as made, it will be open to the
Subordinate Judge, if such should appear to be the most just
and convenient course, to allot to the plaintiff, as his fourth
part of the house property, the whole of some of the houses
and a share in one or more of others of them. The decree

* Appeal No. 25 of 1878 (p. 204 of P. J. 1878.)

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does not necessitate, nor does either party seem to desire the carving off of a fourth part of each and every house.

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MANAKCHAND

v.

NATHU.

Point (j) is disposed of by the decision in *Lakshman Dada Naik vs. Ramchandra Dada Naik*. (1) We think that the Subordinate Judge was right in holding that the father of the parties had not any such testamentary power as to warrant him in making an unequal division of the ancestral moveable estate.

As to point (n) the defendants, although they produced their books to the Subordinate Judge, have failed to file those books or any such extracts from them as to enable them to show that the Subordinate Judge was in error in his views founded on their books with respect to the four items mentioned in point (n), and the defendants have accordingly not succeeded in sustaining this point.

As to point (o), we do not see how consistently with leaving the trade and business of the family in the hands of the defendants, the Subordinate Judge could have proceeded upon any other principle as to the partition of the moveable family property than that objected to by the defendants in point (o).

As to the cross objection of the plaintiff to the direction that he should bear his own costs, we must say that the ordinary rule is not, as the Subordinate Judge supposes, that the plaintiff in a partition suit should pay the defendants their costs of that suit. The general and, as we think, proper rule is that the costs of all proper parties should be borne by the estate, unless the conduct of a party should be so objectionable as either to justify his being deprived of his costs or ordered to pay those of one or more of the other parties. In the present case the Subordinate Judge having provided for the division of the whole of the family estate, and the plaintiff not having objected to that course, there remained no fund out of which the Court could order the costs of the respective parties to be paid, so it was under the necessity of directing the plaintiff and defendants respectively to bear their own costs. At first sight that may appear to be such the same as ordering the costs to come out of the estate, but

(1) 1 Bom., 561.



1878 that is not so, as the burden of Court fees falls more heavily
MANAKCHAND on the plaintiff than any other party.
v. We affirm the decree of the Subordinate Judge and direct
NATHU. the defendants (appellants) to pay the costs of the appeal
to the plaintiff.

The plaintiff must pay the costs (if any) of his cross ob-
September 3. jection.

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Kemball.*

KRISHNAJI DALAJI, deceased, by his widow and heir
NANDIBAI (plaintiff) Appellant v. NARAYAN
RANCHOD (defendant) Respondent, *

Appeal, second—Evidence.

Where a case has been insufficiently investigated by the Joint Judge,
e. g. where he has omitted to consider important evidence bearing on
the *bona fides* of an alleged sale, the High Court, on second appeal, will
remand the case for further investigation

This is an Appeal from the decision of the Joint Judge of
the District of Tanna, in Appeal No. 144 of 1877.

This case must be added to others (which have come
before this Court) insufficiently investigated by Mr. Gopal-
rav Hari, Joint Judge of Tanna. The judgment of the Sub-
ordinate Judge has been reversed by him without consider-
ing a most important point affecting the *bona fides* of the
alleged purchase by the defendant. The asserted oral sale
to him is said to have taken place in May, 1871. Ordinarily,
the application to the revenue officers for a transfer of the
land would have been made then, or within the next month,
or six weeks previously to the season for cultivation. If
there had been then such an application and a razinama giv-
en by Jivan, the occupant, no deed of conveyance would
have been necessary. There was not, however, any such ap-
plication for transfer until the 2nd of July, 1872, i. e., four-
teen months after the alleged oral sale ; and no inquiry has
been made by the Joint Judge as to the cause of such an un-
usual delay—of which very satisfactory evidence ought to

* Appeal No. 234 of 1878 (p. 209 of P. J. 1878.)

Note—A similar judgment was passed the next day by the same
judges in Bandachari v. Annaji in appeal No. 245 of 1878 (p. 210 of P.
J. 1878).



have been given in order to countervail the vehement suspicion arising from the undisputed facts of the case, viz., that this long deferred application was made within ten days of the institution of Jasrup's suit against Jivan, when the latter was probably well aware that Jusrup was about to proceed against him ; that on the 26th August, 1872, the present defendant applied to raise Jasrup's attachment in that suit ; and that the present defendant, on the 2nd December 1872, withdrew that application, that being the very day on which Jivan executed to him the deed of sale, of the same date ; and which deed of sale having been executed by Jivan, the judgment-debtor, while yet his land was under Jasrup's attachment, is of no validity against the attaching-creditor's section 240 of Act VIII of 1859. That attachment was then in full force is shown by the fact that the sale under it to the plaintiff did not take place until the 29th January, 1873.

In the absence of most convincing proof of possession under the asserted oral sale of May 1871, or of some conclusively established excuse for the delay in the present defendant's application for a transfer of the land, neither of which matters seems to have in anywise commanded the attention of the Joint Judge, we cannot think that he has investigated this case in the manner required by law and rendered especially needful by the indisputable facts which strongly support the conclusion of the Subordinate Judge, whose decision has been so lightly set aside.

We reverse the decree of the Joint Judge, and remand this cause for retrial by the District Judge, Mr. Coghlan ; costs of the suit and appeals are to be disposed of by him in such manner as may be just.

Before Mr. Justice West and Mr. Justice Pinhey.
**BALAJI GANESH et vl Applicant v. MAHADEV
HARI, Assignee of REVUBAI VINAYAK,
deceased Opponent. ***

Assignment of interest under decree directing annual payments.

A decree which merely directs annual payments to the judgment-creditor does not impose on the judgment-debtor an obligation to pay

* Extra. Application 43 of 1878 (p. 1214 of P. J. 1878).

1878

**KRISHNAJI
v.
NARAYAN.**

September 5



1878 until the end of each year and in the meantime nothing accrues due to the judgment-creditor which he can assign.

BALAJI

v.

MAHADEV,

This is an Application against the darkhast order, No. 201 of 1877, of the First Class Subordinate Judge at Nasik, dated 12th November, 1877.

The decree which merely directed annual payments to the widow Revubai did not impose on the judgment-debtor an obligation to pay until the end of each year. No right consequently vested in Revubai till the end of each year. It might have been, and would have been, a reasonable decree if the command had been to pay Revubai quarterly or monthly in advance, but this was not the order actually made. The statutes which in particular cases apportion periodical payments show that such apportionment of sums to fall due after and only after the lapse of a particular time cannot otherwise be made. Nothing had accrued due to Revubai which she could assign, and the order of the Subordinate Judge must be set aside with costs.

September. 11.

Before Mr. Justice Melvill and Mr. Justice Kemball.

UMIASHANKAR BAPUJI and others (plaintiffs)

Appellants v. BAI RATAN, widow of Krashnaram

Bapuji (defendant) Respondent and vice versa. *

Hindu Law—Partition—Onus probandi that property joint.

In a partition suit where it is proved that a partial partition has been established it is for the plaintiff to prove that the banking concerns had not been divided; or, in other words, that they continued to be joint.

These are Cross Regular Appeals from the decision of the First Class Subordinate Judge of Kaira, in Original Suit No. 691 of 1875.

After a careful consideration of the evidence in this case we concur with the Subordinate Judge in thinking that the will, Exhibit 26, cannot be upheld. It appears to us that it was concocted by the plaintiffs, either without Krashnaram's knowledge or consent, or when he was in such a condition of mind and body that he was unable to give an intelligent consent.

* Cross B. A. 48 and 51 of 1877 (p. 217 of P. J. 1878.)



It is proved that there had been between the deceased **1878**
Krashnaram and his brothers a division of their moveable **UMIASHANKAR**
property. We agree with the Subordinate Judge that there **v.**
had also been in effect a partition of the rice lands, and an **BAI RATAN.**
actual division of the bonds and decrees which formed part
of the assets of the two banking concerns. This partial
partition having been established, it is for the plaintiffs to
prove that the banking concerns had not been divided ; or,
in other words, that they continued to be carried on as
the property of a joint Hindu family and not as an ordinary
partnership, Narayan Babaji alias Narayan Purshotam and
another *vs.* Nana Manohar *et. al.* (1). We think that they
have failed to discharge themselves of this obligation. The
accounts show that the partners used to take from the bank-
ing business such sums as they from time to time required
for their own separate trades, and that these sums were debited
to their private accounts. We have already said that
the bonds and decrees which form part of the assets of the
firms had been actually divided. It is proved that the
widow of an uncle of the parties (No. 170) set up a claim
to a share in one of the firms, on the ground that her hus-
band had been an ordinary partner, and not a member of an
undivided family, and that this claim was recognized. Taking
all these circumstances with the fact that the plaintiffs and
Krashnaram lived separately, traded separately, and had
actually divided all the property except the banking con-
cerns, we think that the presumption that the banking con-
cerns were carried on as ordinary mercantile partnership is
exceedingly strong, and that the plaintiffs have failed to
rebut it.

We, therefore, amend the Subordinate Judge's decree, and
reject the plaintiff's claim with costs.

Before Mr. Justice Melvill and Mr. Justice West.

September 23.

BAPU VITHU, deceased, his heiress, his widow, **GOU**
(defendant) Appellant *v.* **DHARMA GOVINDA**
et al (plaintiffs) Respondents.*

Appeal, second—Evidence, misapprehension of.

* S. A. 406 of 1875 (P. 225 of P. J. 1878.)

(1) 7 Bom. H. C. R. 153 A. C. J.



1878

**BAPU
v.
DHARMA.**

Where the decision of the lower Appellate Court is based on a misapprehension of the evidence of witnesses in regard to the most material point in the case, the High Court, on second appeal, will remand the case for a reconsideration of the whole evidence.

The rule must be made absolute, as the deposition of witness No. 38 contains certain statements, from which it was competent to the District Judge to infer that the witness deposed to an admission by Mhataria that he held the field in dispute on a ten years' lease from Govinda. The suit is, accordingly, brought again on the file, and as the parties do not object to our disposing of it at once, we proceed to do so. Though the view taken by the District Judge of the evidence of witness No. 38 may be correct, he appears to have misunderstood the evidence of Witnesses Nos. 35 and 37, who do not give any direct evidence "in support of the lease," as the District Judge supposes. The decision of the District Judge being based on a misapprehension of the evidence of certain witnesses in regard to the most material point in the case, we think it necessary to reverse that decision, and remand the case for a reconsideration of the whole evidence, and for a new decree to be made. Costs to follow final decision, with the exception of the costs of this application for review which must be borne by the applicants, the plaintiffs.

September 30.

Before Mr. Justice West and Mr. Justice Pinhey.

BALWANTRAV HARI (plaintiff) Appellant v. NARAYAN RAGHUNATH, and HARI BHIKAJI, deceased, his sons and heirs ATMARAM and others (defendants) Respondents.*

Partnership—Suit by partner against co-partners.

One of several partners of a limited partnership cannot, on quarrelling with his co-partners, claim that the latter shall forthwith refund to him all moneys which he has put into the business.

This is an Appeal from the decision of the Acting Assistant Judge of the District of Tanna, in Appeal No. 230 of 1876.

The plaintiff, two months after entering into a limited partnership with the defendant Narayan, sued to recover from the latter the sums which he had advanced on behalf of the

* Appeal No. 267 of 1878 (p. 229 of P. J. 1878.)



partnership. The case has not been looked at in the Courts below from exactly the right point of view, but, as a matter of fact, the Assistant Judge has found that the fault in the quarrels, which arose between the parties, and the practical severance which followed, was chiefly on the side of the plaintiff. He has, therefore, thrown out his claim altogether. The plaintiff could not claim on quarrelling with his partner that the latter should forthwith refund to him all moneys which he had put into the business. The principles which should govern such a case are to be found set forth in the decision of *Wilson vs. Johnston* (1), and the plaintiff may seek the remedy, if the parties cannot come to terms, to which on those principles he is entitled ; but his present suit in which he treats his partner as simply a debtor for all sums expended by him on the joint account was quite misconceived. We must, accordingly, confirm the decree of the District Court with costs.

1878

**BALWANTRAV
v.
NARAYAN.**

Before Mr. Justice Melvill and Mr. Justice Kemball.

**DAMODARDAS MANEKLAL (plaintiff) Appellant v.
UTTAMRAM MANEKLAL and others (defendants)
Respondents.***

September 25.

*Hindu Law—Partition, finality of—Re-opening—Fraud—
Charges on inheritance.*

Where it was found that the defendants, in a partition of the family property did not deal fairly with the plaintiff and did take undue advantage of him the partition deed was held null and void.

This is a Regular Appeal from the decision of the First Class Subordinate Judge of Surat, in Original Suit No. 2251 of 1872.

The only question which remains for our decision in this case is whether the sum of Rs. 9,500 was a reasonable sum to be paid by the defendants to the plaintiff, in satisfaction of his claim to a fifth share in the family moveable estate.

The Subordinate Judge has arrived at the conclusion that the sum above mentioned was not a reasonable sum, and in this conclusion we concur.

The account, Exhibit 92, shows that, at the date of the

* R. A. 41 of 1875 (p. 231 of P. J. 1878.)
(1) L. R. 16 Eq. Ca. 606



1878
DANQABDAS
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partition, the nominal assets of the firm amounted (after deducting liabilities) to about Rs. 1,30,853. From this amount the defendants claim to deduct an admitted sum of Rs. 5,565, and a sum of about Rs. 35,267 on account of bad debts. It is probable that this latter estimate is an exaggerated one, but for the purposes of our decision, it is not necessary to disallow any portion of it. Deducting these sums, there remains a balance of about Rs. 90,000. The defendants ask to be allowed a deduction of Rs. 6,000, on account of the marriage expenses of their minor brothers. The sum is large, but assuming the correctness of the law laid down in West and Buhler, page 357, it may be allowed, without affecting our decision. Another deduction, which we are asked to make, is for the cost of maintenance of the female members of the family. These members were at the time of the partition, an aunt and a sister of the parties, and the plaintiff's mother. We understand that the sister was married at the time of the partition, and, therefore, the cost of her maintenance could not have entered into the calculation of the parties. The defendants' counsel states that the aunt and mother are at the present time aged respectively 60 and 40. The pleader on the other side alleges that they are older : but we are willing to adopt the defendants' statement, and assume that at the time of the partition the age of the two ladies was 51 and 31 respectively. The Subordinate Judge considers that Rs. 100 a year would be a reasonable amount for the maintenance of each lady, and we think that this estimate is a fair one. The value of an annuity of Rs. 100 on the lives of the two European females of the age of 51 and 31, would amount to Rs. 3,460 and it would probably be less in the case of native females. However, Rs. 3,500 may be allowed, as a deduction, on this account ; and this estimate is the more liberal, because a part at least of the expenses of the plaintiff's mother would naturally fall on the plaintiff. The deed of partition shows that this was in the contemplation of the parties, and from the evidence it appears that such has actually been the case. We are unable to allow any deduction to the defendants on account of the *mandir*. It is not shown that any expenses would be incurred on this account or that after separation, the plaintiff-



iff would be interested in the 'mandir.' The defendants allege that previously to the partition the plaintiff received two sums of Rs. 2,500 and Rs. 1,650, on the understanding that these sums were to be taken into account, whenever a partition might take place between the brothers. Exhibits Nos. 25 and 30 have been produced in support of this claim: but they were never produced or alluded to, until after the remand of the case by this Court, and we think that the Subordinate Judge was right in placing no reliance upon them. The only deductions, therefore, to which the defendants (under the most favourable view) can be held entitled are the sums of Rs. 6,000 and Rs. 3,500 for marriage expenses, and maintenance of the female members of the family: and deducting the sum of Rs. 9,500 from Rs. 90,000, the total of the assets, we have a balance of Rs. 80,500, in which the plaintiff was entitled to a fifth share, or Rs. 16,100. This is sufficient to show that the sum of Rs. 9,500, was by no means a reasonable sum to pay to the plaintiff, on account of his share in the family firm alone. Under these circumstances, it is not necessary for us to inquire further what sum ought reasonably to have been allowed to the plaintiff on account of his share in the family ornaments and moveable property: nor need we go into the question, whether or not at the time of the partition there was any other trading business (other than the family firm) in which any of the defendants were engaged, and which was liable to partition between the plaintiff and the defendants, on the ground that the capital of the business was derived from family funds. The conclusion, which we have formed on a portion of the case are sufficient ground for holding that the defendants have not shown that they dealt fairly with the plaintiff, and did not take undue advantage of him; and we must, therefore, give him a decree, declaring that the partition deed Exhibit 9, is null and void, and that the plaintiff and defendants continue to be members of a united Hindu family.

The plaintiff has made an application to amend the plaint, so as to convert this suit into a suit for partition. If there was no other objections to this proceeding, we could not allow it without the consent of the defendants, and they naturally object to having the terms of a partition decided

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upon the imperfect evidence on the record. We certainly should not feel ourselves in a position to determine, on the evidence recorded, what is the present value, or even what was the value in 1869, of the whole family property. We should have been glad if we could have made a decree which would have prevented further litigation, but we can do no more than suggest to the parties that they will do well to come to some arrangement for giving effect to the partition formerly made, upon the payment of a reasonable additional sum by the defendants to the plaintiff.

We reverse the decree of the Subordinate Judge and make a decree as prayed for in the plaint. The defendants must bear all costs throughout.

September. 30.

Before Mr. Justice Melvill and Mr. Justice Kembball.

VENKATESH GOVIND et al (defendants) Appellants
v. GANPAYA BABSHANBHOG and others
(plaintiffs) Respondents.*

Practice—Application to summon witnesses late.

An application by the defendants made on 4th July to summon witnesses who were not to be examined before the plaintiff's case was closed which happened on 16th July could not well have been made sooner because it would have been unreasonable to summon them until there was a prospect of their evidence being taken without any great delay.

This is an Appeal from an order of the First Class Subordinate Judge of Darwar in Darkhast No. 358 of 1876.

We think that the applications, exhibits 56 and 57, were properly rejected. The applicants had ample time before the date of rejection, on the 23rd July, 1877, to search for and produce any documentary evidence which might be forth-coming. We are informed by their pleader that even up to the present moment the applicants have not attempted to procure any documentary evidence that any of the other defendants have understated the property in their hands.

With regard to the refusal of the Subordinate Judge to allow to the appellants an opportunity of producing the witnesses named in their application, exhibit 165, the case is dif-

* Appeal No. 18 of 1877 from Order (p. 233 of P. J. 1878.)

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ferent. Some of the witnesses named in that application had been previously summoned in consequence of the applications, exhibits 47 and 115. We are informed, (and it is not denied by the pleader on the other side), that these witnesses had attended the Court, but had been allowed to return to their homes, because they could not be examined until the plaintiff's case was closed. The plaintiff's case was not closed till the 16th July, 1877. The application, exhibit 165, was made on the 4th July, 1877, and we think that it could not well have been made sooner, because it would have been unreasonable to summon the witnesses named in it, until there was a prospect of their evidence being taken without any great delay. The application, exhibit 165, was rejected by the Subordinate Judge on the 19th July, on the ground that it was too late. We think that it was too late, in respect of the witnesses named in it, to whom commissions might have been issued, if the applicants had put in interrogatories in accordance with the Subordinate Judge's order on exhibit 47 ; but that it was not too late, in respect to the witnesses whose personal presence before the Court it was desired to secure. We must, therefore, direct the Subordinate Judge to summon the following witnesses and take their evidence, if they are forthcoming ;—

1. Venkatramanbhat bin Timanabhat.
2. Hanmant Shanbog bin Mudlagiri Shanbog.
3. Wasudev bin Subrav Shanbog.
4. Janardan bin Venktesh Shanbog.
5. Anantappaya bin Surappaya.
6. Mr. R. F. Brachen.
7. Hooka Punsu Shett.
8. Purshotam bin Hanmantbhat.
9. Babubhat bin Annabhat.
10. Ganesh Subsetti.
11. Pomahegde alias Manjhegde bin Timanahegde.
12. Katte Timmanahegde bin Timanahegde.

We also think it desirable that the appellants themselves should be examined, if they offer themselves for examination.

After taking the additional evidence hereby ordered to be taken, the Subordinate Judge should reconsider his order of

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1878 the 27th July, 1877, so far as it relates to the appellants
VENKATESH Venktesh and Keshav, and should decide what is the amount
of property liable to partition in their hands.
v.
GANPATA. This finding shall be forwarded to this Court within three
months from this date.

OCTOBER 3.

Before Mr. Justice Melvill and Mr. Justice Kemball.
NAROTAM BHAGVAN Plaintiff v. MITHALAL
KAHANDAS and 42 others Defendants.*

Jurisdiction—Caste question—Bom. Reg. II of 1827
S. 21, cl. 1.

It would be an interference in a caste question within the meaning
S. 21, cl. 1 of Bom. Reg. II of 1827 if a Court were to make a decree
ordering the members of a caste to re-admit a member to a participa-
tion in caste communications and privileges.

This is a reference from the Subordinate Judge of An-
kleshwar, under section 617 of Act X of 1877.

This Court cannot accept the interpretation put by the
Subordinate Judge on the words " caste questions " in the
unrepealed portion of clause 1, section 21 of Regulation II
of 1827. A much more extended effect has always been gi-
ven to those words by the Civil Courts (*e. g.*, in *Shankara*
vs. Hanma (1).

We entertain no doubt that it would be an interference in
a caste question, within the meaning of that section, if a
Court were to make a decree ordering the members of a
caste to readmit a member to a participation in caste commu-
nications and privileges. And we do not doubt that the le-
gislation intended to prohibit the making of such decrees, if
for no other reason, because they would be incapable of en-
forcement. It would be absurd to place a Civil Court in the
predicament of being called on to imprison every member of
a caste, who might at any time omit to ask the plaintiff to
dinner, or might refuse to give him water or fire.

There is no doubt an incongruity, as the Subordinate
Judge points out, between the construction which we put up-
on section 21 of Regulation II and the provisions of clause
3, section 2 of Regulation V. of 1827 which provides a pe-

* Civ. Ref. 6 of 1878 (p. 235 of P. J. 1878.)
(*a.*) I. L. R., 2 Bom., 470.



riod of limitation for suits "for recovering the right of participation in caste communications and privileges." The latter section has now been repealed, and even if it were still in existence, it could not operate to get rid of an express prohibition in another regulation. It is no doubt fair to use it, so far as it supplies any assistance, in an endeavour to arrive at the intention of the legislature : for it may fairly be argued that if the legislature had intended to prohibit suits of the kind specified in section 2 of regulation V of 1827, it would not have provided a period of limitation for such suits. But allowing all due weight to this argument, we think that the intention of the legislature in section 21 of Regulation II is so clear that we cannot allow our judgment to be affected by the provision in section 2 of Regulation V, and can only suppose that the latter provision was inserted *per incuriam* and in forgetfulness of the prohibition contained in Regulation II of 1827.

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v.
MITHALAL.

Before Mr. Justice West and Mr. Justice Pinhey.

October 3.

VITHAL GOVIND Applicant v. MARTAND LAKSH-
MAN Opponent.*

*Execution of decree—Decree declaring plaintiff co-owner—
Interest on mesne-profits.*

A decree declaring the plaintiff a co-owner of a village with the defendant cannot be executed by partition by metes and bounds, but should be executed by giving notice to all persons concerned that the plaintiff holds an equal right with the defendant in the property and every part of it, and that all persons liable to account as tenants or otherwise to the owners are accountable equally to the plaintiff as to the defendant.

The Court executing a decree cannot give interest on mesne-profits not awarded by the decree.

This is an application against the order of the First-Class Subordinate Judge at Dhulia, dated the 19th November, 1877, in Darkhast No. 73 of 1877.

The Subordinate Judge has misconstrued the decree of this Court, which awarded to the plaintiff Martanda a moiety of the village in all respects and in every part. He was thus constituted a co-owner and tenant in common with the defendant Vithal Govind of undiscriminated moieties of the

* Extra. Application 44 of 1878 (p. 236 of P. J. 1878.)

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village of Ranmalla. Such a decree could not properly be executed by a mere partition by metes and bounds, as such a distribution in specie would possibly injure the property of each of the co-owners. It should have been executed by giving notice to all persons concerned that Martanda now held an equal right with Vithal in the property and every part of it, and that all persons liable to account as tenants or otherwise to the owners were accountable equally to Martanda as to Vithal. As to property in the actual possession of Vithal, Martanda should have been put into joint possession along with him, while, conversely, if Martanda had assumed exclusive possession of any portion of the property, Vithal should at the same time have been put into joint possession for the common enjoyment of that portion. Should either of the co-owners thus placed side by side in possession of the common estate be dissatisfied with his position, he might sue the other for an actual physical division of the village, or a partition effected by sale, or in such other way as should be just. Should either of the two receive more than a moiety of the sums realized out of the estate, he would be accountable to the other, and might be sued for the excess; but the decree of this Court would, in the meantime, have been fully executed by putting the plaintiff into joint possession as owner of a moiety. This should now be done in the manner already prescribed.

The Subordinate Judge has ordered the defendant to pay damages to the plaintiff for *man-pans* not realized by the latter. There was no order to this effect in the decree. The amount actually realized by the defendant on this account should be included in the mesne profits to date of execution, and a moiety of these as of the other produce of the village should be given to Martanda by Vithal.

As to the costs the decree of this Court while directing the respondent Vithal to bear the appellant Martanda's costs of appeal did not in any way vary the order of the Court below as to costs in that Court. Instead of Rs. 681-1-1, therefore, Martanda should have applied for Rs. 622-15-1, and so much only should have been allowed to him on account of costs in the Court below.

The mesne profits, as far as ascertained by the Subordi-

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nate Judge in his decree, were awarded by this Court agreeably to that decree. The mesne profits of the moiety, i. e., a moiety of the mesne profits down to the date of execution by the putting Martanda into joint possession were added to the amount of the Subordinate Judge's award. But there was no order made for payment of interest on these mesne profits ; and without such an order the Subordinate Judge could not legally allow such interest in executing the decree.

His order must be varied accordingly.

Costs of this application to be borne by the opponent.

Before Mr. Justice West and Mr. Justice Pinhey.

October 9.

NILKANTHA GANESH (defendant) Appellant v.
SHIVRAM NAGESH, deceased by his legatee
Shitaram Chintaman (Plaintiff) and another
(defendant No. 1) Respondents. *

Limitation—Adverse possession—Perpetual lease by tenant for life.

Where on a partition between brothers, a piece of land is assigned to their mother for life as a means of subsistence, adverse possession under a perpetual lease granted by her and some of her sons of the land so assigned will not commence as against the brothers who have not acquiesced in the lease until the mother's death.

This is an Appeal from the decision of the District Judge of Satara, in Appeals Nos. 170 and 171 of 1876.

The document No. 4 constituted a partition of the interests of the three brothers Shivram, Ramchandra and Vishnu, although their mother Saraswatibai during her life was to have possession of the land now in dispute paying to each of the brothers a certain sum out of the profits of it, and retaining the residue as a means of subsistence. During Saraswatibai's life, Vishnu, by a transaction, acquiesced in by Ramchandra, granted to Gopal, now represented by the defendant Nilkantha, a perpetual lease of the whole of the land. The rents were for several years taken by Saraswatibai, and it does not appear that she paid his share to Shivram probably because of his absence on a pilgrimage to Benares. Ramchandra died before his mother, and Sivram also having

* Appeal No. 119 of 1878 (p. 237 of P. J. 1878.)



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died, his representative Shitaram now sues Nilkantha and Vishnu for possession of a moiety of the land.

The objection taken on the ground of limitation cannot, we think, be sustained. The land having been assigned to Saraswatibai during her life, a right to possession of it, to possession in common along with the other sharers, arose to each only on her death. The adverse possession of Vishnu, therefore, and of Nilkantha as Vishnu's lessee cannot be traced further back, and her death occurred within the period of limitation.

It has been urged that Shivram, by relying on the lease to Gopal in a suit to recover assessment paid on the land, adopted the transaction recorded in it, but it appears that he did not seek anything in virtue of a contract alleged by him to subsist under the lease. He merely adduced it to show how Gopal and Nilkantha had got into possession. This does not in any way estop him from saying that the lease was not binding as against himself.

It could not, under ordinary circumstances, be binding. Taking it as made on account of Saraswatibai who received the rent under it, it could operate only for her life. As made by Ramchandra and Vishnu, it could grant an interest only in their shares of the property. So far they had power to deal with it, the lease must be sustained as to their $\frac{2}{3}$ rd of the whole. As to the other $\frac{1}{3}$ rd their transaction with Gopal was invalid, they having no authority from Shivram to represent him for such a purpose.

Shitaram is, therefore, entitled to possession of $\frac{1}{3}$ rd of the land, and as Sivram and Vishnu were co-heirs of Ramchandra he is entitled to one-half of Ramchandra's share of the perpetual rent due by Nilkantha. This, as Shitaram resumes $\frac{1}{3}$ rd of the property, must be reduced to $\frac{2}{3}$ rd of the annual sum mentioned in the lease No. 16, and of this $\frac{2}{3}$ rd Shitaram is entitled to $\frac{1}{4}$ th *i. e.*, to $\frac{1}{6}$ of the whole rent agreed on.

In dividing the land so as to give to Shitaram his $\frac{1}{3}$ rd share, care should be taken, as far as possible consistently with fairness of distribution according to original value and convenience, to assign to him those portions on which



Nilkantha has spent least money for the purpose of making improvements.

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Costs of this appeal to be borne by the respondents.

**NILKANTH
v.
SHIVRAM.**

Before Mr. Justice Melvill and Mr. Justice Kemball.

BAI TULSA widow of Farasram Applicant v. BHAJI

November 25

ADAM ABRAHAM Opponent.*

*Construction of Statute—Restrospective operation —
Execution of decree.*

Where an application for attachment was made and the warrant of attachment was issued before Act X of 1877 came into force :—*Held* that the judgment-creditor was entitled to have the warrant executed in the same manner and to the same extent as if Act X of 1877 had not been passed.

Application against the order of the Second Class Subordinate Judge of Broach, dated the 18th February, 1878.

The application for attachment was made on the 24th September, 1877, *i. e.*, before Act X. of 1877 came into force, and the warrant of attachment was issued on the same date. We think that the case falls within the principle laid down *in re* Ratanshi Kalianji and others (1) and that the judgment-creditor is entitled to have the warrant of the 24th September 1877, executed in the same manner and to the same extent as if Act X of 1877 had not been passed. We, therefore, make the present rule absolute, and direct that the warrant be executed as if Section 266 of Act X of 1877 had not been passed.

Before Mr. Justice Melvill and Mr. Justice Kemball.

November 26

**RANCHODRAI CHOTAMRAI (plaintiff) Appellant
v. LAKSHMAN PAHUJI (defendant)**

Respondents†

*Procedure—Appeal from Order—Reference by District
Court—Civ. Pro. Code, Ss. 53, 588 and 617.*

No appeal lies from an order rejecting a plaint under S. 53 Cl. C. of Act X of 1877, and a District Judge to whom such an appeal is made has no power under S. 617 to refer to the High Court a question arising in such an appeal.

* Extra. Application 76 of 1878 (p. 263 of P. J. 1878)

† Civ. Ref. 7 of 1878 (p. 264 of P. J. 1878).

(1) I. L. R., 2 Bom., 148.



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RANCHOLRAI **Reference from the District Judge of Khandesh under**
v. **Section 617 of the Civil Procedure Code (Act X of 1877).**
LAKSHMAN It is not clear under what provision of the law the
Subordinate Judge rejected the plaint ; but he probably
did so under Section 53, clause (c) of the Code, because it
was not subscribed, as required by Section 51. There is no
appeal under Section 588 against such an order of rejection,
and the first question referred by the District Judge must
be decided in the negative. The case not being properly
before the District Judge, he had no power to refer, under
Section 617, the second question raised by him. This
Court, therefore, cannot decide this question under Chapter
XLVI of the Code. The plaintiff can, if she thinks fit,
make an application to the Court for the exercise of its
extraordinary jurisdiction, supporting the same by an
affidavit stating the facts necessary to enable the Court to
determine whether the plaintiff was "not resident within
the local limits of the jurisdiction " of the Subordinate
Judge of Nandurbar within the meaning of Section 37 of
the Code. In the meantime the proceedings in the case will
be retained.

November 26

Before Mr. Justice Melvill and Mr. Justice Kemball.
JIVI, widow of Krishnaji Valji Plaintiff v. RAMJI
VALJI Defendant. *

Small Cause Court—Maintenance, suit for—Second appeal.

A suit for maintenance is not cognizable by a Small Cause Court,
and therefore a second appeal lies.

This is a Reference from the District Judge of Tanna
under Section 617 of the Civil Procedure Code. (Act X of
1877).

This Court cannot entertain this reference, because a suit
for maintenance is not cognizable by a Court of Small
Causes, *Sidlingapa vs. Sidava* (1), and therefore a second
appeal lies, and the District Court's decree is not final.
The plaintiff can file a second appeal against the District
Court's decree, and the same will be received, if presented
within three weeks from this date.

° Civ. Ref. 9 of 1878 (p. 265 of P. J. 1878.) .

(1) 2 Bom, 624.



Before Mr. Melvill and Mr. Justice Kemball.

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BRIJMOHANDAS, and Vrijmohandas, deceased, his sons and heirs Vrijratandas and Govindas (defendants) Appellants v. SUNDARDAS LILADHAR, deceased, his son and heir Goverdhandas, also deceased, by his heiress and widow, Krishnabai, minor, by her guardian and Administrators to the estate Nagindas Harjivandas and Valabhdas Hirachand (plaintiffs) Respondents. *

Jurisdiction—Cause of action.

If the plaintiff's firm at Poona drew bills on the defendant's firm at Madras, and put the defendants in funds to meet those bills by purchasing and remitting to the defendants bills on bankers in Madras, of which the defendants received payments, and the defendants' firm never drew bills upon the plaintiff's firm, the cause of action would not arise in Poona.

But if the plaintiff's firm, drew bills on the defendants and the defendants' firm drew bills on the plaintiff and the result of such transaction was a balance in favour of the plaintiff, the Poona Court would have jurisdiction.

This is a Second appeal from the decision of the Acting Judge of Poona, in Appeal No. 16 of 1877.

The contention before us is that the plaintiff's firm at Poona drew bills on the defendant's firm at Madras, and put the defendant in funds to meet those bills by purchasing and remitting to the defendant bills upon bankers in Madras, of which the defendant received payment. It is denied that the defendant's firm ever drew bills upon the plaintiff's firm. If such was the course of business between the parties, it would be very difficult to hold that the cause of action arose at Poona. It certainly appears to us that the appellant's contention is supported by the accounts filed in the case (exhibits 5, 6, and 34); and if it were open to us to form a conclusion on the evidence, we should probably be of opinion that the appellant's contention was made out. But the Courts below have found on the evidence that the plaintiff's firm drew bills on the defendant's firm, and the defendant's firm on the plaintiff's firm, and that the result of these transactions is a balance in favour of the plaintiff. No doubt, if this view of the nature of the dealings between the parties be correct, the Courts below had jurisdiction :

* Appeal No. 359 of 1877 (P. 265 of P. J. 1878.)



1878 and having regard to the deposition of witness No. 33, we
BBIJMOHANDAS cannot say that there is no evidence, (though it is certainly
v. very meagre and unsatisfactory), to support the conclusion
SUNDARDAS at which the Lower Courts have arrived. This being a
second appeal, we cannot interfere with a finding of fact
which is supported by a certain amount of evidence, and
we must therefore confirm the decrees of the Courts below.
Under the circumstances we direct that the parties bear
their own costs of this appeal.

December 3.

Before Mr. Justice West and Mr. Justice Pinhey.
RAMCHANDRA alias Bapu Mankeshvar, deceased,
his sons and heirs Sakharam and others (defendants)
Appellants and Opponents v. GUNVANTRAV
BHAGVANTRAV alias Bapu Saheb (plaint-
iff) Respondent and Applicant.*

*Limitation—Act XIV of 1859, S. 1, Cl. 7. S. 24—Mamlat-
dar's order for possession under Act XVI of 1838 in
Satara—Suit for possession.*

The sense in which the Regulations were introduced in the Satara State by the proclamation of 1848 was to be gathered from the practice sanctioned or suffered to prevail, and by reference to this, it is certain that the Government chose to recognize, and by recognition, to constitute the Mamlatdar's Courts as revenue Courts for the purposes of Act XVI of 1838. After the 1st January when the Bombay Regulations were introduced into Satara, any question as to the authority of a Mamlatdar and as to the limitation applicable to suits by which it was sought to supersede orders made by him subsequently to that date would be governed by the same consideration as in the other Regulation districts. This however did not in any way deprive of their effect any legal relations duly constituted before 1863. The Limitation Act of 1859 had in view not the nature of the authority by which Act XVI of 1838 came into operation, but the nature of the order passed under it, which, after the prescribed lapse of time was to serve as a bar to further proceedings. Where, therefore, an order for possession had been passed before 1863 by an officer vested with authority in that behalf by Government the party put out of possession was by S. 1, cl. 7 and S. 24 of Act XIV of 1859, allowed only 2 years after 1st January 1863 within which to bring the suit for possession.

This is a second Appeal from the decision of the District Judge of Satara, in Appeal No. 65 of 1877.

* Appeal No. 214 of 1878 (p. 269 of P. J. 1878).

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The point now made was not dwelt on in argument when the appeal was before us on a former occasion. If it had been pressed, we should have dealt with it at the time. The authority of the Collector to deal with cases of immediate possession under Regulation XVII. Chapter VIII. of 1827 might, according to the provisions of Regulation VI of 1830, be delegated to the Mamlatdar (Kamavisdar) in the sense of the suits being referred to the inferior officer when the property was of less value (as in this case) than Rs. 500. The power of delegation was in practice construed more widely; and with the sanction of the Collectors, Mamlatdars throughout the Bombay Presidency used to deal with claims to immediate possession, subject, as provided in Section 5 of Regulation VI of 1830, to an appeal to the Collector. Doubts eventually arose,—and not without some reason,—as to the legality of the proceedings thus held by Mamlatdars without a special reference on the part of the Collectors, and eventually Bombay Act V of 1864 distinctly constituted the Mamlatdars judges of original jurisdiction for the trial of claims to immediate possession arising under Act XVI of 1838, Section 1, Clause 2, by which the earlier regulation law had been superseded. What that Act says is that “it shall be lawful for the Revenue Courts to give immediate possession of all lands..... to any party dispossessed of the same.” The only Revenue Court contemplated in 1827 had been the Collector’s Court. After 1830 it might be said that the Mamlatdar’s was a Revenue Court empowered therefore to deal with a claim to immediate possession. On the other hand, it might be said that having authority to deal only with cases referred to him the Mamlatdar was not a Judge and his Kacheri was not a Court except when such reference had been made. The latter may have been the more sound interpretation, but the former was the one which was accepted and acted on down to the year 1864.

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In this state of things the proclamation of 1848 directed that the administration of Satara should be conducted generally according to the Bombay Regulations. The functions of Government as to that non-Regulation district were not divided into the legislative, judicial, and executive, exercise

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ed by different authorities, The command of the Govern-
ment constituted the law, as it also disposed of particular
matters of detail as they arose. Acts operated, and orders
made under them were orders made under those Acts, be-
cause the local Government chose to allow their operation.
Act XVI of 1838 was thus allowed to operate, and orders
made under it were properly referred to the Act itself, al-
though the local Government might have refrained from in-
troducing it, and thus in a manner it was only in a remote,
not in an immediate, sense that the Act as such was binding.
Mamlatdars were appointed and exercised the powers then
understood to be properly attributable to them according to
the Bombay Regulations. It has been argued that those Re-
gulations had not of their own virtue any binding operation
in Satara, and that is correct. They were introduced so far
as the Government intended and in the sense that it intend-
ed. Its will constituted the law. This was manifested as to
the Mamlatdars' jurisdiction by their being allowed to exer-
cise all, through the period down to 1864 as well as after it,
the powers which were (perhaps erroneously) supposed to
be invested in them under the Regulations and the Act al-
ready referred to. In the Regulation districts the interpre-
tation of the law belonged to the regular Courts. They re-
presented the Government in its revisional and judicial capa-
city, and a mistake of the Government in another depart-
ment did not constitute a binding expression of its will; but
in Satara, what the Government willed was the law, and
what it willed was manifested by what it sustained. Thus,
even though the Government was in error in supposing that
the Mamlatdars' Courts were Revenue Courts of original ju-
risdiction under Act XVI of 1838 in the Regulation districts
that error did not prevent its will from giving to the Ma-
mlatdars in Satara, with full legal effect, the powers which it
perhaps only supposed they had elsewhere. However it
might be therefore in the Regulation districts, in the Satara
territory the Mamlatdars' Courts were constituted, by the
sanction of the ultimate authority, revenue Courts having
authority to deal with questions of immediate possession
under Act XVI of 1838. A possession given by a Mam-
latdar's Court even in the Regulation districts by an order

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prior to Bombay Act V of 1864 has never, so far as we are informed, been held so completely inoperative in law that article 7 of section I of Act XIV of 1859 would not be brought into operation by it ; but as to Satara there was no higher authority than the executive Government, or rather there was no distinction of its legislative capacity by attribution to a separate body. The sense in which the Regulations were introduced was to be gathered from the practice sanctioned or suffered to prevail, and by reference to this, it is certain that the Government chose to recognize, and by recognizing, to constitute the Mamlatdars' Courts in the province of Satara, Revenue Courts for the purposes of Act XVI of 1838.

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After the 1st January, 1863, when the Bombay Regulations were introduced into Satara, any question as to the authority of a Mamlatdar and as to the limitation applicable to suits by which it was sought to supersede orders made by him subsequently to that date would be governed by the same considerations as in the other Regulation districts. This however was so, because the Government becoming specialized and distributed amongst different organs as it attained a higher development, the voice of the legislature had to be expounded by the judiciary in order to determine what had been the intention of any particular law. The order or approval of the executive Government was no longer effectual for such a purpose. This however did not in any way deprive of their effect any legal relations duly constituted before 1863, and such a relation had been constituted in this case. The Limitation Act had in view not the nature of the authority by which Act XVI of 1838 came into operation, but the nature of the order passed under it, which after the prescribed lapse of time was to serve as a bar to further proceedings. The order for possession had in this case been passed by an officer vested with authority in that behalf by the Government, and the party put out of possession was by Act XIV of 1859, section 1, article 7 and section 24 of the same Act allowed only two years after 1st January, 1863, within which to bring the present suit.

We, accordingly, reject the application.

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December 3.

Before Mr. Justice West and Mr. Justice Pinhey.

**RAMCHANDRA SADASHIV and others (defendants)
Appellants v. RAM Babu and others (plaintiffs)
Respondents. ***

Right to sue—Dignity, suit to vindicate.

As to that part of a decree which pronounced the plaintiff entitled as against a temple committee, alienees of the village revenue, to pass or join in passing the annual Kabuliyat, in which it urged that as the managers passing a Kabuliyat must account for exactly what they receive, the alleged right which the defendants were called on to recognize was one attended with no possible pecuniary advantage and was a mere onerous dignity, the denial of which did not form a ground of action cognizable by a Civil Court, the Court said :—It has been held in many cases that where the payment of a fee is purely voluntary, no action lies by one asserting a right to the sum paid against the person who he says has wrongfully received them. Dignities too, the essence of which consists in voluntary tributes of respect, which derive their whole value from their spontaneousness, do not in their nature admit of effectual protection by the Municipal Courts. So also where the act of a public servant, avowedly not touching private rights, and legally inoperative as regards such rights merely puts people into an unusual position from which wrong inferences might be drawn to their detriment by those who form hasty judgments, it is recognized that such an act though the person affected may be really inconvenienced in consequence of it, does not form a ground of action. The Sadar Court, on remand, ruled that redress in this particular case must be sought through the executive Government, and not through the Courts of law. But it does not follow from this that no dignities at all, provided a money gain is not attached to them, are fit objects to be protected by the Courts. The right, if it subsists, to collect the revenues of a village is a dignity of a very practical kind, the enjoyment of which those who are concerned ought not to obstruct, and which the Courts are quite able to protect without lending encouragement to frivolous litigation. Where, too, the dignity carries with it a right to receive money, we are not satisfied that it can be placed in the same category as the right to be carried crosswise in a paliki, or to cut the throat of a sacrificial ox. No case has been cited to us in which, where the right to levy money existed, it was held unfit for protection by the Courts because the money when levied must be handed over to some higher recipient. The English cases have mostly been between the rightful holder of some office and an alleged usurper ; but if the right subsists, and can be practically exercised only by some concurrent act on the part of another, the right to this latter

* Appeal No. 300 of 1878 (p. 271 of P. J. 1878).

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act may, by the original grant, or by prescription, have become adherent to the principal right. The Courts below say that this is such a case. The temple committee, they have found, having always, until lately, accepted a kabulayat from the plaintiffs and another class of persons the kulkarnis, jointly, had become bound to adhere to that practice. And according to ordinary principles presumption would certainly arise, supposing a definite profit had been realized by the plaintiffs, that the part which the committee had uniformly played, was the performance of a legal duty correlative to a right vested in the plaintiffs. It may be, and it seems likely, that the plaintiffs cannot make a profit out of the position they claim, but under the circumstances that we have stated, we do not think that on that account it can be said they have not and cannot have an effectual ground of action against the defendants.

This is a Second Appeal from the decision of the Acting Judge of the District of Ratnagiri, in Appeal No. 240 of 1876.

The capacity to collect the land revenue from individual occupants of land and settle with Government or the assignee of the rights of Government for the aggregate collections or for some lump sum by way of commutation has been so uniformly treated by the Courts as a right, not as a mere burden compensated by the dignity of office, that the Courts below have not dwelt on the present case in the aspect in which it is now pressed on us for the appellants. The claim to any emoluments, if it ever subsisted in the plaintiffs (respondents) has been held barred by the lapse of more than 12 years since the last receipt by them, and against that part of the adjudication there is no appeal. As to that part which pronounces the plaintiffs entitled as against temple committee, alienees of the village revenue, to pass or join in passing the annual kabulayat, it is urged that as the managers passing a kabulayat, must account in this case for exactly what they receive, the alleged right with the defendants have been called on to recognize is one attended with no possible pecuniary advantage. It is a mere dignity of an onerous rather than of a profitable character, the denial of which does not form a ground of action cognizable by the Civil Courts. It has been held in many cases that where the payment of a fee is purely voluntary, no action lies by one asserting a right to the sums paid against the person who he says has wrongfully received them. Dig ties too, the essence of which consists in voluntary tributes of respect,

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which derive their whole value from their spontaneousness, do not in their nature admit of effectual protection by the Municipal Courts. So also where the act of a public servant, avowedly not touching private rights, and legally inoperative as regards such rights, merely puts people into an unusual position from which wrong inferences might be drawn to their detriment by those who form hastily judgments, it is recognized that such an act, though the person affected may be really inconvenienced in consequence of it, does not form a ground of action. On the other hand, the Privy Council, in the great Palki case, *Shri Shankur Bharti Swami vs. Sidha Lingaya Charanti* (1) say that "the usurper of a dignity is guilty of a wrong which is, to a certain degree, prejudicial to every one who has a just title to the dignity ; and the manner in which such a wrong is to be redressed must depend upon the municipal laws of each particular country." The case having been remitted to Bombay, the Sadar Court found that redress in the particular case, if to be had at all, was to be sought through the executive Government, not through the Courts of law ; but it does not follow from this that no dignities at all, provided a money gain is not attached to them, are fit objects to be protected by the Courts. The right, if it subsists, to collect the revenues of a village is a dignity of a very practical kind, the enjoyment of which those who are concerned ought not to obstruct, and which the Courts are quite able to protect without lending encouragement to frivolous litigation. Where too dignity carries with it a right to receive money, we are not satisfied that it can be placed in the same category as the right to be carried crosswise in a palki, or to cut the throat of a sacrificial ox. No case has been cited to us in which, where the right to levy money existed, it was held unfit for protection by the Courts because the money when levied must be handed over to some higher recipient. The English cases have mostly been between the rightful holder of some office and an alleged usurper : but if the right subsists, and can be practically exercised only by some concurrent act on the part of another, the right to this latter act may, by the original grant, or by prescription, have become

(1) 3. M. Ind, Ap. 217.



adherent to the principal right. The courts below say that this is such a case. The temple committee, they have found, having always, until lately, accepted a kabulayat from the plaintiffs and another class of persons, the kulkarnis, jointly, had become bound to adhere to that practice. And according to ordinary principles the presumption would certainly arise, supposing a definite profit had been realized by the plaintiffs, that the part which the committee had uniformly played, was the performance of a legal duty correlative to a right vested in the plaintiffs. It may be, and it seems likely, that the plaintiff cannot make a profit out of the position they claim, but under the circumstances that we have stated, we do not think that on that account it can be said they have not and cannot have an effectual ground of action against the defendants.

But again, it is urged that if the right subsists in the plaintiffs to share in the revenue management of the village, the mere refusal of the defendants to accept their kabulayat cannot deprive them of that right. This is true, but what they complain of is an obstacle thrown in the way of their exercise of this right, which, so long as it lasts, prevents any enjoyment of the right. The plaintiffs being a numerous class, custom, agreeing with convenience, requires that the ryot liable for land revenue should know to whom he may safely pay it. Thus one representative of the class each year passes a kabulayat for the revenue which makes him liable to the committee and in turn makes the ryots secure in paying their assessment to him. The subsidiary right, it is obvious, may be infringed, while the principal right to which it is incident subsists in full force, though through this infringement practically incapable of exercise. The objection therefore is not we think, one which on examination can be sustained.

But the other class of managers were, it is said, necessary parties to the suit. The plaintiffs however, complained of no wrong done by that rival class. The committee, they complained, being bound to accept a kabulayat from one of their number each year, chose to refuse to accept it. This was a tangible ground of complaint, even if the rival class of kulkarnis had not profited by the sole management which the committee handed over to them. According to another por-

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tion of the appellant's argument, the kulkarnis did not even profit by the business thus assigned to them exclusively, but whether they did or not, the plaintiffs might properly limit their suit to those who alone according to their representation had injured them. If the committee had received notice from the kulkarnis that they alone were entitled to the management and intended to insist upon their right, they might properly have asked to be guarded against injury from the conflict of the opposing claimants. This would have been their position had the respective rights of the rivals been still judicially unascertained. But in fact, some members of the kulkarni party had already sued some of the plaintiffs' party to establish their exclusive right and had failed. In another suit by one of the plaintiffs against one of the kulkarnis his right had been upheld, though the particular relief that he sought had been refused. It was not under these circumstances, and after these representative cases had been decided, necessary for the plaintiffs to make the kulkarnis co-defendants in this suit. The Court would have made them co-defendants had it appeared that this was necessary for a right adjudication, or that their interests could be injuriously affected by their being left out of the case. The defendants, if they wished to do so, could have defended themselves by asserting the rights of the kulkarnis or any other rights which were inconsistent with those set up by the plaintiffs, and the interests of the defendants only being affected by the decision, no third party, who can establish a right against the plaintiffs, will be prejudiced in any future action.

We have thus dealt with the objections to the decrees of the Courts below which have been ably pressed by Rav Sahab Vishvanath Narayan Mandlik. The result is that we must confirm the decree appealed against with costs.



Before Mr. Justice Melvill and Mr. Justice Kemball.
MAHADSHET BABA JISHET (plaintiff) Appellant
v. LAKSHMAN BALU and others (defendants)
Respondents.*

1878
December 10.

Alienation by guardian ad litem—Act XX of 1864, S. 18—
Surrender of unexpired mortgage—Immovable pro-
perty, interest in.

The unexpired portion of a mortgage with possession is immovable property within the meaning of S. 18 of Act XX of 1864 and a surrender of the same by the administrator of a minor's estate is an alienation within the meaning of the same section and is illegal and invalid if made without the sanction of a Civil Court.

This is an Appeal from the decision of the District Judge of Ratnagiri, in Original Suit No. 5 of 1877.

The mortgage which the administrator of the minor defendant's estate surrendered in 1871 was not redeemable until 1873. At the date of the surrender, therefore, the minor was not only in possession of the mortgaged property but was absolutely entitled to possession and enjoyment of the profits of the estate for a further period of two years. We are of opinion that the interest which the minor thus had in 1871 in the mortgaged estate was "immoveable property" within the meaning of Section 18 of Act XX of 1864, and that, in surrendering the mortgage, the administrator "alienated" such property within the meaning of the same section. The alienation, having been made without the sanction of the Civil Court previously obtained, was illegal and invalid. On this ground, and without going into the other questions in the case, we confirm the decrees of the Courts below with costs.

Before Mr. Justice Melvill and Mr. Justice Kemball.
NILKANTRAV DEVRAV and others (defendants)
Appellants v. JIVANRAV KESHAV (plaintiff)
Respondent.†

December 11.

Service Tenure—Grant, construction of—Performance
of service.

Where a grant of land was made "on account of the eldership" and

* Appeal No. 54 of 1878 from order (p. 281 of P. J. 1878.)

† Appeal No. 262 of 1878 (p. 284 of P. J. 1878.)

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it contained a clause that " inasmuch as the *vriti* and the *haks* at Hudli, and 7 (other) items have been set apart on account of eldership, Dad a himself should perform whatever work there may be in connection with the *vatan*, such as the Sarkar accounts," &c.—*Held* that these words cannot be construed as making the tenure dependent upon the continued performance of service. They clearly indicate that the grant was already complete, and had been made on account of eldership, but they superimpose on it a condition for the performance of service. At the most, the performance of service is only a portion of consideration for the grant ; and therefore, in the absence of express words declaring that, the service ceasing, the tenure shall determine, the grant does not become void merely for the reason that the service ceases to be performed.

This is an Appeal from the decision of the District Judge of Belgaum, in Appeal No. 60 of 1877.

The decision of this case depends mainly, as the District Judge has made it depend, upon the construction of Exhibit 48, but we find it impossible to concur with him in holding that, upon a true construction of that document, the lands now in dispute were granted solely on account of service, and are liable to be divided, because the necessity for service has ceased. The grant was distinctly made " on account of the eldership." It is true that towards the close of the document the following passage occurs : " Inasmuch as the *Vriti*, and the *haks* at Hudli, and seven (other) items have been set apart on account of eldership, Dada himself should perform whatever work there may be in connection with the *vatan* such as the Sarkar accounts, &c." But these words cannot be construed as making the tenure dependent upon the continued performance of service. They clearly indicate that the grant was already complete, and that it had been made on account of eldership but they superimpose upon it a condition for the performance of service, At the most, the performance of service is only a portion of the consideration for the grant ; and therefore in the absence of express words declaring that, the service ceasing, the tenure shall determine, the grant does not become void merely for the reason that the service ceases to be performed. This is very clearly laid down by the Judicial Committee of the Privy Council in *Forbes vs. Meer Mahomed Tuqee* (1). The District Judge has laid much stress on the terms of the

(1) 12 M. I. A. 438.



plaint, Exhibit 56, in a suit brought by Devrav against Mahadevrav, in which Devrav claims a contribution from Mahadevrav for the expenses of service, on the ground that Mahadevrav had taken his full share of the family estate, without having made any provision, as the other sharers had done, for the assignment to Devrav of an extra share on account of eldership. It is argued from this that Devrav has himself interpreted the term "eldership" as equivalent to an obligation to render service. But independently of the consideration that the defendants would not be estopped in this suit by any expressions which their father might have used in a plaint against a third party, it does not appear to us that the plaint in question can be construed as containing any admission that the extra share assigned to Devrav was solely on account of service, and not in consideration of eldership. The meaning seems simply to be that some of the sharers had joined in making an assignment to Devrav on account of eldership, and that in consideration of such assignment Devrav had consented to perform their part of the service: but as regarded a sharer, who had entered into no such arrangement, he took his stand upon the original obligation which lay upon all the sharers to render service, or contribute to the expenses. This is a very different thing from an admission that (to use the words the Privy Council) " the performance of the service was the whole motive to, and consideration for the grant." If such was the intention either of Exhibit 48, or of Exhibit 56, it does not appear why any mention of " eldership " should have been made at all. It would have been sufficient, and only natural, to say that the assignment was made for service, without any mention of the circumstance of Devrav's " eldership," as constituting the ground for the privilege granted to him.

For these reasons, we reverse the District Judge's decree and restore that of the Subordinate Judge, with costs on the plaintiff throughout. If the plaintiff has been called upon to pay judi in lieu of service, it may be that the defendants are bound to reimburse him for the amount so levied from them, because their father undertook to perform the whole service, and because they are still in possession of the extra grant, which induced their father to undertake that obligation : but that is a question which it is not open to us to consider in the present suit.

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Before Mr. Justice West and Mr. Justice Pinhey.

1878
December. 5.

**BHIMASHA DONGRISHA et al (plaintiffs) Appel-
lants v. KRISHNASHA deceased, by his son Ram-
chandra, and others (defendants) Respondents. ***

*Hindu Law—Alienation of ancestral property—Sale in
execution of decree against member alone of undivided
family in respect of family debt.*

A sale in execution of a decree against one of the several Hindu brothers, the manager of the undivided family, in a suit in respect of a debt incurred in the course of the family business, but in which the defendant was not sued as manager, and where only the right, title and interest of the defendant sued are sold, will not pass the interest of the other members of the family

This is a Second Appeal from the decision of the District Judge of Belgaum, in Appeal No. 82 of 1877.

The defendant Bhujangsha sued Nagusha for a business debt, and obtaining a decree sold in execution the family house which belonged to Nagusha and his brothers Krishnasha and Tuljasha. In the meantime, Krishnasha had sold the house by a registered deed to Bhimasha, a connexion of the family. Bhimasha and his vendee Chetusha now seek possession of the whole house taken by Bhujang asserting that Krishnasha was the manager of the family. This allegation the Courts below have found not proved, and Nagusha having been found to be manager, the family, (being one engaged in trade), and the property of the family were answerable for his business transactions. The authorities referred to in West and Buhler, p. 342 (2nd ed.) seem to establish this point. Bhujang, therefore, was in a position to make his claim good against the whole house which seems to have been the sole remaining family estate, had he adopted the proper means. But instead of joining the other members of the united family as co-defendants with Nagusha (1) or even suing Nagusha as manager, which might possibly have been sufficient, Ramamani Ammal vs. Kulanthai Natchear and others (2), Bhujang proceeded against Nagusha, simply as if he had been separate in interests, and in execution of his decree he

* Appeal No. 304 of 1878 (p. 286 of P. J. 1878)

(1) See Narandas Narayan Singh vs. Dwarkalal, Pr.Co. 22,11-77.

(2) See 14 M. I. A. at p. 346, per Sir J. Colville.



put up for sale only Nagusha's right, title and interest in the house. Admitting that the interest of Nagusha in the house could thus be disposed of without a proceeding whereby it had been ascertained through a general partition, still it is plain that Nagu's interest was not the sole interest and that by the sale of it such other interests as there were, were left unaffected. In *Dundyal Lal vs. Jugdip Narayan Singh* (1), it was held that by the sale in execution of a father's interest, the share of the father only was disposed of, not the share of his sons; and similarly in this case, by the sale of Nagusha's interest, the shares of Krishnasha and of Tuljasha were left unaffected.

These shares, accordingly, the plaintiff Bhimasha can recover if they have been legally transferred to him. In the present suit, Krishnasha did not appear. Tuljasha admitted the plaintiff's claim. This, as against them, was enough to support the suit, and the objection that a single member cannot alone dispose of joint property could not consistently be raised by one holding in virtue of a sale of the right in the same property of a single member. The sale to Bhimasha may have been intended to protect the estate, and as against any transaction by which in its absence the shares of Krishnasha and Tuljasha would be bound, may have been unsustainable, but here the point is that these shares had not been affected. Had Bhujang adopted the proper course, they might have been, but by the execution-sale and purchase of Nagusha's interest, and that only, he acquired nothing more. It is said that he was put into possession of the whole house, but his possession is to be ascribed where he had a title to that title. It has been ruled that a person taking a co-parcener's share in execution takes the possession with such right as the co-parcener himself had, and that right in this case could no more prevent the disposal of Krishna's and Tulja's shares than it could prevent the disposal of Nagusha's, without the concurrence of all the members, or a proceeding in which all were included. When Bhujang obtained possession, Bhimasha was already owner by a registered conveyance of as much as Krishnasha could dispose of, and he took possession under a title which did not necessarily displace

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(1) L. R., 4 I. A., 247; W. and B p. 341.



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Krishna's sale. This was admitted by Tulja to extend to his share also, and these two shares, as Bhujang had not proceeded against them, Bhimasha was entitled to recover, just as Krishna and Tulja might have recovered them, had they not sold to him.

We, accordingly, modify the decree of the District Court by awarding to Bhimasha and Chetusha two-thirds of the house. The parties severally are to bear their own costs in each Court.

1878
December 12.

Before Mr. Justice Melvill and Mr. Justice Kemball.
RADHABAI, widow of Vasudev Trimbak Applicant
v. RAGHO and Ramchandra Trimbak Opponent. *

Hindu Law—Maintenance of widow—Money received from son-in-law by widow.

The fact that a widow received money from her son-in-law in consideration of his marriage to her daughter will not affect her right to insist upon a continuance of the maintenance decreed to her.

This is an Application against the order of the Acting Judge of Ratnagiri, in Miscellaneous Appeal No. 11 of 1878.

Assuming it to be the case that Radhabai received money from her son-in-law in consideration of his marriage to her daughter, we hold, on the authority of Strange's Hindu Law Vol. II, p. 30, that such receipt did not affect her right to insist upon a continuance of the maintenance decreed to her from the opponents. On this ground, and without determining whether the Subordinate Judge had power to make such an order in execution, we reverse the order made by the Subordinate Judge on the 29th January, 1878, and direct that he dispose of Radhabai's application of the 6th August 1877, according to law. The costs of and incidental to the present application to be borne by the opponents Ragho and Ramchandra.

* Extra. Application No. 103 of 1878 (p. 292 of P. J. 1878.)



Before Mr. Justice West and Mr. Justice Pinhey.

1878

AMRITRAV VINAYAK, deceased, by his son and heir, September 18.

Vinayak, minor, by his administrator, **Krishnaji Raghunath** (defendant) Appellant v. **ABAJI HAIBAT** (plaintiff) Respondent, and *vice versa*.*

Hindu Law—Partition, finality of—Subsequent rises in value—lapsed share, right to inherit—Re-union.

Where under the terms of a deed of partition between the brothers the shares of each are defined in particular parts of the family property but there is no actual division, the brothers are entitled to the shares as so defined notwithstanding subsequent change in value of the different parts. Where there is no re-union each brother is entitled to a share in the lapsed share of a deceased brother dying without issue. It is only in the event of a re-union amongst some of the former coparceners that they could acquire *inter se* rights of inheritance exclusive of those of the other members.

These are Cross Appeals from the decision of the First Class Subordinate Judge of Satara, in Original Suit No. 3133 of 1864.

The objection in this case that the suit was barred by limitation has not been sustained. From the time of the introduction into Satara of the Acts and Regulations governing the other districts of the Bombay Presidency a period of two years was allowed by the Limitation Act before its provisions could operate on suits filed in the district thus newly brought within its action. The two years, according to Bombay Act III of 1863, expired on the 1st January, 1865; and the present suit was filed on the 31st December, 1864. Regulation V of 1827 was referred to, but even if that Regulation would apply to the case, it has not been shown to us that it was in operation, or that a law identical in effect with it was in operation in Satara prior to the introduction of the Bombay laws in general by the Act of 1863.

The construction of the deed of partition executed in 1817 and set forth at length in a decree of 1826 (Exhibit 3) is not altogether free from difficulty, yet on a consideration of the whole document it is plain that it was intended to operate as a declaration of a general division of interests amongst the six brothers who were parties to it. It purports indeed to be a record of partition amongst six brothers who, it says,

* Cross Appeals Nos. 57 and 59 1877 (P. 293 of P. J., 1878.)



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had actually "become separate" two years before, the years however being wrongly expressed through a mistake of the Arabic numeral words. There are some clauses in the instrument, no doubt, which distinguish the share and the rights of the eldest brother Bhawanishankar from those of the other five brethren which for this purpose are treated as an aggregate, but this is easily accounted for by the nature of the subject and the particular purpose in view. The governing idea of the deed as set forth at the head of the specification of details is that "the lands.....should be divided by the six brothers according to their shares," and that "they are severally to receive out of the revenues of the three villages the amounts mentioned" (as due to each one) Rupchand Tilukchand vs. Phulchand Dharmchand and another (1)

In making this division an estimate is drawn out on the principle of allowing to the eldest Moro Bhawanishankar an annual sum of Rs. 1,666-8 on account of "davlat kharch" (expenses of his office and eldership) and to each brother, Moro included, one sixth of the remaining produce of the three villages held as vatani inam by the family. It is probable that at the time when the deed was drawn up, there was no anticipation on either side of any considerable future variation in the relative values of the villages, and thus the language employed is rather less precise than was to be desired as to whether in proceeding to assign to Moro one-half of Bichukle and one-third each of Sonke and Arle it was intended that these should become his absolute separate estate with its contingencies of improvement and deterioration, or whether, the intention being merely to turn the joint interests of all into separate interests like those held by tenants in common, extending each over all the estate, the distribution of the proceeds of the respective villages was made merely as a present arrangement whereby the proper proportional demand of each sharer was to be satisfied. But looking back to the clause which says that all the lands at the several villages are to be divided and to the provision for distributing permanently the movable property, the

(1) 2 Borr. R. 670. W. and B. 309 (2nd Ed.)



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services of certain dependants, and the family *wada* amongst the respective parties, we think that the estimate of proceeds was subsidiary to the valuation of the villages as the property to be distributed, and that the shares being once determined were intended to be held thenceforward in each village according to the proportions laid down in the deed in final satisfaction of the rights of each sharer.

The documents Nos. 6 and No. 7 dated in 1834 and 1840 support this construction of the deed recited in Exhibit No. 3. The five brothers as a body being entitled to a moiety of the proceeds of Bichukle which was in the occupation, so to speak, of Moro while he was entitled to one-third of the proceeds of the village of Sonke which was occupied or managed by the five brothers the documents Nos. 6 and No. 7 are estimates of what the moiety and the one-third share respectively are worth. The one-third as estimated is set off against the moiety, and it is agreed that for seven and for five years Moro shall pay to the five brothers the excess coming over to them. As to Arle such an arrangement was impracticable because according to the deed of partition the management of that village was to be held by one of the six brothers whom the others should elect for the purpose.

Thus the deed of partition was not in any way superseded by the late documents Nos. 6 and 7. The latter of these extended only to the year 1845, but payments in accordance with it were continued down to a couple of years before the institution of this suit. In the meantime, the rents of the village of Bichukle had considerably increased through a new revenue survey and assessment, and the line of one of the five junior brethren had become extinct. By the operation moreover of the Summary Settlement Act a "judi" or quit-rent had been imposed on the estate as the price of a waiver on the part of Government of an investigation of the title to exemption from full assessment. The first question that arises is whether the lapsed share belongs to the representatives of all the six brothers parties to the original deed of partition, or to the representatives only of the five junior brothers. As the deed of partition effected a general severance of interests, it was only in the event of a reunion amongst some of the former co-parceners that they could

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acquire *inter se* rights of inheritance exclusive of those of the other members (1). There is no evidence of any formal reunion amongst the members. The documents Nos. 6 and 7 point to a continued severance of interests and the latter being executed by the widow of the deceased co-parcener Madhavrav, who could have no independent right in a united family, shows both that at the time when it was made, the junior brothers regarded themselves as divided each from each, and that they had, notwithstanding, a common right as against Moro Bhavanishankar the head of the family. Even if the five, however, were not severed *inter se* by the first partition-deed they must as to Madhavrav have become so before his death, so that to his share the heirship of each of the four and of the eldest Moro would be equal. The plaintiffs in this case sued on the express ground that the deed in Exhibit No. 3 had effected a complete partition and the defence rested not on an assertion of non-partition or reunion, but on the effect of the document No. 7 and long payment and receipt of a one-fifth part of the annual sum due under it as barring the claim. The engagement, however, of the document No. 7 as also of No. 6 was not to pay a specified aliquot portion of the excess due to each of the five brothers, but to pay annually the amount as settled to all the five brothers in five instalments. The several right to a several portion each year could arise only from a separation of interests which existed apart from the documents Nos. 6 and 7 and the defendant asserting that the plaintiff Mahadaji's representative was entitled to but a fifth share of the sum annually payable {in effect insisted on a general partition brought about by the deed of 1817 and not effected by any subsequent reunion. There can be no reasonable doubt that there was a general partition which has continued down to the present time, and under these circumstances the five remaining brothers or their representatives inherit in equal shares the one-sixth share that belonged to the one whose line has become extinct.

Bichukle having greatly increased in productiveness, the plaintiff's contention that he is entitled to a share of that

(1) W. and B. 61.



increase is met on the part of the defendant by an assertion that the several junior sharers are entitled for ever only to the Rs. 86 each and a small grain allowance provided for by the agreement No. 7. That document, however, is expressly limited as to the time for which it is to operate. Moro and Moro's representatives were as to the village of Bichukle, trustees for the other co-owners and could not by continuing to pay Rs. 86 to each of them year by year ever free themselves from the responsibility subject to which they held that property. So long as the agreement operated, it fixed the amount at which the trustees' responsibility was settled for each year. When its term had expired, the parties giving and receiving still in accordance with its stipulations would by implication adopt it still as a fair adjustment of their reciprocal rights and liabilities. But if it was not thus made the measure of the payments by voluntary adoption, the only result would be that the ordinary obligations of trustees would immediately become incumbent on Moro's representative, on the one hand, and the representatives of the junior brethren, on the other. A balance between the proceeds of Bichukle and of Sonke not being any longer settled by agreement would have to be ascertained by an actual investigation of the accounts. The plaintiff has not, since the introduction of the new assessment been content with the sums paid to him ; this indeed is not asserted by the defendant who rested on his right to resist the payment of Rs. 86 a year. The proceeds of the village as actually realized must be brought into the account in forming the aggregate of which the plaintiff's share is to be an aliquot part.

Those proceeds while they have been increased by the new assessment introduced into Bichukle, have been diminished by the imposition of the quit-rent payable to Government in virtue of the summary settlement. Each of the parties to the original partition in taking a share of the estate took it subject to its proper proportion of any charges or deductions affecting the whole. The quit-rent therefore must be deducted from the gross proceeds of each village before dividing them into the proper fractional parts that are to be assigned to each sharer. From the gross revenue of

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Arle the Subordinate Judge has allowed a deduction on account of "magni bab" as due to the defendant alone in a right independent of that which he holds under the deed of partition. This deduction has not been seriously contested and must be allowed, while that claimed on account of Sonke must be disallowed for the reason given by the Subordinate Judge, that the "bab" or cess is one of a kind not payable since the introduction into the village of the revenue survey and assessment.

The Subordinate Judge appears to have erred in supposing that the plaintiff (Exhibit 48) admitted Rs. 129-12-0 was the sum payable to "pot-inamdars" for the year 1864-65. He admitted that such a payment had been made in the preceding year, but said that in the year before that it had been much smaller. The amount actually expended is what ought to be allowed, and this will necessarily form an item of the account of the proceeds gross and net of the villages subsequent to the finding of the present suit.

As to sums said to have accrued due to the plaintiff before the finding of the suit, and of which he demanded four years' arrears, we inquired in the course of the argument whether it appeared distinctly in evidence that there had been a dissent on the plaintiff's part from a continuance of the arrangement under Exhibit 7, a demand of the precise share coming to him according to a strict adjustment of accounts and a tender of an exact account of the proceeds of Sonke held by him and the junior branches of the family. No such evidence was produced, and it does not appear that we can properly award arrears of which we cannot say exactly whether, contrary to the Subordinate Judge's finding, they are due, or whether the agreement for fixing the amounts payable at a particular time, which was in fact paid, had been definitely repudiated before the finding of the suit.

By the death of a brother representing an interest in the whole estate, the share of each of the remaining branches was increased to a proportionate extent. Thus the defendant's share in Bichukle became $\frac{1}{2} + \frac{1}{5}$ of $\frac{1}{5}$ of $\frac{1}{2} = \frac{1}{2} + \frac{1}{50} = \frac{52}{100}$ while the other branches became owners of $\frac{4}{5}$ of $\frac{1}{2} + \frac{1}{5}$ of $\frac{4}{5}$ of $\frac{1}{2}$ or $\frac{2}{5} + \frac{4}{50} = \frac{48}{100}$. In Sonke and Arle the share of

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the deceased being $1/5$ of $\frac{2}{3}$ or $2/15$ of the whole, the defendant became entitled to $1/5$ of $2/15$ and the other branches to $4/5$ of $2/15$ by the extinction of that line. Thus the defendant's $\frac{1}{3}$ rd share became $\frac{1}{3} + 2/75 = 9/25$ while the other branches owned $4/5$ of $\frac{2}{3} + 4/5$ of $2/15 = 8/15 + 8/75 = 48/75$. The net income having been ascertained it must be distributed in these proportions between the elder and younger branches, the elder getting credit separately out of the gross income for the Arle "magni bab," and then the plaintiff is to receive one-fourth of the amount due to the younger branches. The accounts are to be made up on this principle from the institution of the suit; and the plaintiff to receive so much as may be found to be due to him.

The question of costs has been complicated by the circumstances that an amended plaint was filed by order of the District Court, that the rate of stamp duties had varied considerably in the interval, and that finally the Subordinate Judge disallowed a considerable portion of the claim, which portion each party desires to have valued at the rate more favourable to himself. Some considerable portion of the plaintiff's claim as valued for stamp duty has been established. On so much up to the amount covered by stamp duty at the earlier rate, he may, we think, properly be allowed costs according to the earlier mode of valuation. Should the amount coming to him exceed the sum thus covered, the valuation of the excess should be at the new rate. On so much of the total claim as may have been disallowed the defendant is to have costs estimated according to the new rate. The mode of distribution is to be applied to the costs in the Courts below and in both appeals in this Court.

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AMRITRAV
v.
ABAJI.

Before Mr. Justice West and Mr. Justice Pinhey.

BARATI BEGAM alias Biban Saheb Kazi Ismail, deceased December 10.

her sons and heirs, Shekh Imamudin Kazi Ismail and
Shekh Karimudin Kazi Ismail (plaintiffs) Appel-
lants v. SHEKH KARIMUDIN alias Badesaheb
Shekh Dyamudin (defendant) Respondent.*

Jurisdiction—Pensions Act XXIII of 1871.

The Pensions Act XXIII of 1871 does not apply to a suit between co-sharers of an Inam where there has been an adjudication by the

*Appeal No. 228 of 1878 (P. 297 of P. J. 1878.)



1878
BARATI BEGAM
v.
SHEKH
KAMRUDIN.

Inam Commissioner under Act XI of 1852, Sch. B., Rule 2, on a claim, based on Sanads, to hold the land as exempt from liability to revenue recognizing such claim.

This is an Second Appeal from the decision of the Acting Judge of Poona, in Appeal No. 194 of 1877.

The Sanads in this case might admit of a limited construction according to Waman Joshi *vs.* The Collector of Tanna (1) restricting the right of the grantees to an interest in the land revenues of the village. Whether Persian grants from Musalman rulers are to be interpreted in a narrower or a wider sense on account of their excluding or including a formula drawn from some Hindu grants from the ordinary 'ashtabhogam' enumeration in formal transfers of land under the Hindu law, is a question that may admit of some doubt and will require careful consideration when the question necessarily arises for decision. In the present case, however, the parties, it is evident, based or were assumed to base on the sanads a claim to the land as exempt from liability to land revenue. The Inam Commissioner who investigated the claim disposed of it expressly under Act XI of 1852, Schedule B, Rule 2, which says that "any land held under a sanad declaring it to be hereditary shall be so continued." Had the claim been merely to a share in the land revenue, or even to the whole of the revenue as such, the Inam Commissioner could not have dealt with it under the rule we have quoted, or apparently under the Act at all.

His decision, however, now constitutes the right of the inamdars as against the Government. They are created or recognized as proprietors on a kind of entail of the land subject of course to existing rights carved out of the estate. This being so, the case falls within the principle of Vasudev *vs.* The Collector of Poona (2) and Ravji N. Mandlik *vs.* Dadaji B. Desai (3). We must accordingly reverse the decision of the District Judge pronouncing the suit between co-sharers of the estate one in which the cognizance of the Civil Courts is barred by the Pensions' Act XXIII of 1871, and remit the cause for disposal on the merits.

Costs to follow the final decision.

(1) VI, Bom. H. C. Rep., p. 191

(2) X Bomb. H. C. Rep. p. 471

(3) I. L. R., 1 Bomb., 523,



Before Mr. Justice West and Mr. Justice Pinhey.
ACHRATLAL GIRDHARLAL (Appellant) v.
GUJRATH S. & W. Company Limited (Res-
pondents) and GIRDHARLAL DALPAT-
RAM (Appellant) r. The GUJRATH
S. & W. Company Limited
(Respondents). *

1878
December 18.

Attachment before Judgment, Appeal from order for—
Civ. Pro. Code, Ss. 483, 484 and 485 and 588.

Before reversing an order for attachment before judgment the Appellate Court must be satisfied that it was wholly erroneous.

These are Appeals from the order of the First Class Subordinate Judge of Ahmedabad, on Application No. 2664 of 1877.

R. WEST J.—Although the deposition of the broker Maganlal is not so circumstantial as it might well have been, although the Subordinate Judge might properly have hesitated to issue the order of attachment without eliciting the details of the alleged conversation between him and the defendants, yet it cannot be said, I think, that he had not evidence upon which to base the conditional order of attachment which was eventually made a plenary one. Sections 483, 484 and 485 of the Code make it plain that a large discretion is intended to be left to the Court in cases of this kind. Section 484 enables it to make a provisional attachment, and to call on the defendant to show cause why it should not be continued without any further evidence than the statement on examination of the applicant. The Court is to make only such “further investigation as it thinks fit,” and if upon such investigation it “is satisfied that the defendant is about to dispose of his property with intent to obstruct the execution of any decree that may be passed against him,” it calls on him to show cause, and the cause shown not satisfying the Court, it orders a plenary attachment. It is not to be expected that the evidence which satisfies one judge will in every case satisfy another, and the principle generally recognized, and in this case properly admitted

* Appeals Nos. 13 and 14 of 1878 (p. 309 of P. J. 1878.)



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by the appellant's Counsel, Mr. Macpherson, is, that before reversing an order of this kind on appeal, the superior Court must be satisfied that it was wholly wrong. "This principle should be firmly adhered to, namely, that we must call upon the party appealing to show us irresistibly that the opinion of the judges on the question of fact was not only wrong but entirely erroneous" (1). Here the testimony of Maganlal, meagre as it is, owing probably to the haste of the Judge who took it, is quite to the point. He says the defendants told him that it would be of no use for the plaintiffs to proceed against them for the reason that they possessed no fixed property and were about to dispose of that which they held in the form of shares. This statement on oath was not met by any counter statement on oath of the defendants. The attempted proof of an *alibi* failed. Thus the testimony of Maganlal, pertinent as far as it goes, and not insufficient to justify the order of attachment, if implicitly believed, stands virtually uncontradicted, or at least undisplaced. A second Subordinate Judge to whom cause was shown against the conditional order of the first, confirmed it. He as well as his predecessor must have believed Maganlal, and I do not think we can say that this belief was wholly unreasonable. If it was not, the order must be confirmed.

As to the merits of the case, questions of some little difficulty may arise and have been suggested as to the responsibility of both or of one of the defendants. It would be very inconvenient on an appeal of this kind to go into these questions with a view to pronounce on whether or not there is a *prima facie* case against the defendants. The Subordinate Judge must have thought there was, and it is not consistent with practice, or even with law, to withdraw a trial from the Lower Court, at its incipient stage, for the mere purpose of determining whether a good ground of action subsists or not. Neither, therefore I think, should we pronounce by implication on any such question now.

I should have hesitated to issue the order made by the

(1). Per Lord Chelmsford in *Gray vs. Turnbull*, L. R. 2 Sc. App. at p. 54.



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Court below, but I am not prepared to reverse it. I should be prepared to entertain an application by both parties for the removal of the whole case to this Court with a view to minimizing the inconvenience caused by the attachment to the defendants by means of a prompt disposal of the suit here.

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Costs of this appeal to be borne by the appellants.

ROBERT HILL PINHEY, J.—I am of opinion that the orders made by the First Class Subordinate Judge in this case under Sections 484 and 485 should be reversed and discharged, and that the application of the plaintiffs under Section 483 should be dismissed with costs. I am of opinion that the evidence by which the plaintiffs' application is supported, and on which the Subordinate Judge's order nisi issued is wholly insufficient to warrant the issue of any such order—an order the effect of which was to place the whole of the defendants' property under attachment, and to compass the present financial ruin of the defendants, and to injure their credit financially and morally to the end of time. This evidence consists of the single uncorroborated statement of the broker Maganlal Abhechand, made on solemn affirmation before the Subordinate Judge, and of course without a single question being put to him by way of cross-examination to test either his credibility or the manner in which he obtained his information. The evidence of the broker Maganlal Abhechand is contained in 12 lines and is as follows :—

“ During the conversation which I had had with the defendants four or five days ago, I asked them what they did about the plaintiffs' shares. To this they replied. What have we to do. We possess no houses in the town, nor do we possess any fields in the country. What will they (the plaintiffs) do to us. As to the shares that we hold, some of those in the Murarji Company have been sold by our order and steps have been taken to dispose of the rest also. What will the plaintiffs have now.”

I simply cannot believe this statement. Much less can I consider it sufficient to justify the attachment of the whole

III 13.

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of the defendants' property. According to this broker, when he impertinently asked the defendants, " what they did about the plaintiffs' shares, " the defendants immediately and (unless their object was to procure the sequestration of their property) without any object whatever proceeded to volunteer to the broker all the information thnt was requisite to support such an application as the plaintiffs made 4 or 5 days later. This is contrary to my experience of the ways of mankind. We know from other parts of the case which have been discussed before us that the parties were at arm's length, and that in a correspondence which had passed between them, the defendants had repudiated the liability with which the plaintiffs desired to fix them. The defendants had therefore ample reason for being on their guard. Is it conceivable that in this state of facts the defendants would voluntarily make to an ordinary broker, who does not say either that he is a particular friend of theirs, or that he even has business relations with them, a statement which was equivalent (in the words of the section 483 of the Civil Procedure Code) to a statement that " with intent to obstruct or delay the execution of any decree that may be passed against them, they were about to dispose of the whole of their property. " I confess that I am unable to believe that the defendants did or would have done any thing of the kind. That is I do not believe the evidence of the broker Maganlal Abhechand, and I am unable to understand how so capable a judicial officer as the Subordinate Judge who granted the rule nisi should have believed it, or been satisfied with it, without apparently himself putting one single question to the deponent. This being my opinion, I think the rule nisi and order for interim attachment were wrongly granted, and should be reversed and discharged. It follows that it is necessary for me to consider the further questions which were argued before us, viz., whether the defendants showed good cause against the rule nisi and supported their cause with adequate or credible testimony, or whether the application, under the section 483, should not be discharged on the ground that the plaint does not disclose a good ground of action against the defendants.

As however I have the misfortune to differ from my

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brother West as well as from the Subordinate Judge, whose order is appealed against, and as my brother West considers that the order appealed against should be upheld, this appeal must be dismissed and the order of the Subordinate Judge affirmed under Section 575 of the Code of Civil Procedure.

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Before Mr. Justice Melvill and Mr. Justice Pinhey.

December 19.

BAI TUISA widow of Farasram Tuiram Applicant r.

SERIADJI HORMASJI *et al* Opponents. *

Procedure—Instalment decree.

A decree should not be made payable by instalments on a mere allegation of the defendant not made upon oath.

This is an Application against the order of the Small Cause Court Judge of Broach, dated 2nd April, 1878, in Suit No. 88 of 1878.

From the Small Cause Court Judge's report it appears that he has acted upon an oral allegation of one of the defendants, not made upon oath or solemn affirmation and for the falsity of which, if false, he could not be made responsible. The defendant ought to have been regularly examined; and if the Small Cause Court Judge thought that the allegations made by the defendant constituted, *prima facie*, a sufficient ground for making the decree payable by instalments, the plaintiff should have had an opportunity of producing evidence in disproof of those allegations. The decree of the Small Cause Court Judge so far as it directs payment to be made by instalments, is reversed, and he is directed, after taking the steps above indicated, to make a fresh decree, in which he will provide for the costs of this application.

*Extra. Application No. 63 of 1878 (P. 313 of P. J. 1878.)



1879.

1879

January 8.

Before Mr. Justice West and Mr. Justice Pinhey.

GANGABAI ANIBHAT (plaintiff) Appellant v.
KRISHNAJI DADAJI (defendant) Respondent.*

Execution of decree—Attachment and assignment of right to maintenance sale in execution.

A Hindu widow's right to maintenance out of family property is not assignable and therefore it does not make her the owner of the property or any part of it, so that her execution creditor by selling it as hers could transfer it to a stranger.

This is a Second Appeal from the decision of the District Judge of Belgaum, in Appeal No. 121 of 1877.

It is possible that had the proper steps been taken by Parvatibai against her son Anibhat or his widow Gangabai, she might have succeeded in getting some part or the whole of the hereditary estate made specifically liable for her maintenance. But no such step was taken, and the right which she had to proceed against the holders of the property did not at all make her owner of it, or of any part of it, so that her execution-creditor by selling it as hers could transfer it to a stranger. The defendant Krishnaji is such a stranger, a purchaser under a decree against Parvatibai of a house which did not belong to her. He has not thus acquired any right at all against the real owner Gangabai (1).

We must therefore reverse the decree of the District Court and restore that of the Subordinate Judge with all costs in the District Court and in this Court on the respondent Krishnaji Dadaji Kulkarni.

January 8.

Before Mr. Justice West and Mr. Pinhey.

RAVLOJIRAV TAMAJIRAV Applicant v. SATU
NARSAPPA Opponent.†

*Jurisdiction—Bom. Act III of 1876—Mamlatdar's order—
retrial—Acquiescence.*

The Collector has no authority to set aside an order made by a Mamlatdar under Act III of 1876 and direct a retrial before another Mamlatdar. An order passed on such retrial is without jurisdiction.

*Appeal No. 329 of 1878 (p. 2 of P. J. 1879)

†Appeal No. 92 of 1878 (Extra. Jur.) p. 5. of P. J. 1879.

(1) See W. and B. p. 448 (d).



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The fact that the person against whom such an order is passed appeared, when summoned, before the second Mamlatdar, is not an acquiescence in the propriety of the proceedings, nor would such an acquiescence of itself, give the Mamlatdar a jurisdiction which he did not possess to sit in appeal on the judgment of his predecessor.

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This is an Application against the order of the Mamlatdar of Chikodi, dated the 21st day of June 1878, in Suit No. 9 of 1877 under Bombay Act III of 1876.

R. WEST, J.—The order made by the second Mamlatdar in supersession of the one made by his predecessor must be set aside. No application for a review of judgment had been made to him by either party to the earlier proceeding, and the Collector had no authority to direct or suggest the re-opening of an enquiry already disposed of by a judicial decision.

We do not think that the applicant Ravloji by appearing when summoned before the second Mamlatdar acquiesced in the propriety of the proceeding in which he was summoned. But his acquiescence would not of itself give to the Mamlatdar a jurisdiction, which he did not possess, to sit in appeal, without any invitation even by a person interested, on the judgment of his predecessor. When he had passed an order affecting the applicant, the latter came up within the prescribed time to seek the interposition of this Court.

The order of the first Mamlatdar may to a greater or less extent have been influenced by a misapprehension of the judgment passed in the civil suit instituted by the Chief of Sangli against Ravloji, and of the precise legal position in which the execution of Ravloji's decree against his mother had placed the parties concerned. But his error, if there was an error, was not one of such a character that we ought now, in the exercise of our extraordinary jurisdiction, to set aside the order that he made on that account. The case is one in which, as is not unusual, there was a good deal of complexity arising from points of disputed physical possession. The Mamlatdar, as is also not unusual, may have dealt with the questions before him in a way different from that which will appear correct to the ordinary Civil Court, but that Court can supply a remedy for any mistake that may have been made, and to it the opponent in this case, if he feel aggrieved, should resort.

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We therefore set aside the second order leaving the first to take effect. Costs on opponent.

Rule made absolute with costs.

ROBERT HILL PINHEY.—The second order of the Mamlatdar was clearly without jurisdiction. The case had been decided by his predecessor, and the Collector had no authority whatever to interfere in the case, much less to set aside the first Mamlatdar's order and direct a retrial. As to the first order of the Mamledar it may not be right. At all events it is not so utterly unreasonable and without foundation as to warrant this Court's setting it aside in the exercise of our extraordinary jurisdiction. Its effect is only to settle temporarily the question of possession between the parties. If the respondent Satu Narsapa is entitled to the property to which the order of the Mamledar refers, he can have his right affirmed and possession of the property restored to him by filing a regular suit in the Civil Court.

The rule nisi issued in this case on 19th September, 1878, must therefore be made absolute with costs, and the order passed by the Mamledar Mr. Hayaudan Bhagwant, dated 21st June, 1878, be set aside, and the order passed by Mamledar Bapu Rambaksh on the 25th August, 1877, must be restored.

January 7.

Before Mr. Justice West and Mr. Justice Pinhey.

KURNARAM DAYARAM (Applicant) v. HINIBHAY VIRBHAN (Opponent). *

*Hindu Law—Stridhan—Ornaments given by husband—
Onus probandi,*

If there has been an actual and complete gift without fraud the ornaments belong solely to the wife. If given only in the sense of being placed in her charge for use on extraordinary occasions they remain the property of the husband. Wearing the ornaments at festivals affords a ground of inference in favour of the husband's ownership. The inference is in no case conclusive. Possession being *prima facie* proof of ownership, the *onus* of showing, when the wife has the ornaments, that the two do not go together, lies on him who affirms that proposition.

This is a reference under the provisions of Section 617

^c Civ. Ref. 10 of 1878 (p. 8 of P. J. 1879.)



of the Code of Civil Procedure from the Judge of Surat, dated 11th December 1878, in Darkhast No. 1712 of 1878 of the file of the Subordinate Judge of Ankleshwar.

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The answer to question 1 is given at pages 441 and 443 of the 2nd edition of West and Buhler's Hindu Law. If there has been an actual and complete gift without fraud, the ornaments belong solely to the wife. If given only in the sense of being placed in her charge for use on extraordinary occasions, they remain the property of the husband.

In answer to question 2.—Wearing the ornaments at festivals affords a ground of inference in favour of the husband's ownership, only if there is no wearing of them on other occasions. The inference is in no case conclusive.

In answer to questions 3 and 4.—Possession being *prima facie* proof of ownership, the onus of showing,—when the wife has the ornaments,—that the two do not go together lies on him who affirms that proposition.

Before Mr. Justice West and Mr. Justice Pinhey.

JAGJIVAN NARBHERAM, deceased, his son and heir
Natha, a minor by his next friend Chanchallal plaintiff
v. KEVAL LALDAS defendant.*

January 7.

Certificate of administration, necessity for.

Notwithstanding the general rules as to civil procedure contained in Act X of 1877, it is not competent to a person assuming the position of next friend without a due and legal recognition of his authority under the Minors' Act, to carry into effect a decree made on behalf of the minor represented by another person duly authorized.

This is a reference under the provisions of Section 617 of the Code of Civil Procedure from the Judge of Ahmedabad, dated 18th November 1878, and No. 747.

The special rules as to minors and their estates contained in Act XX of 1864 continue to operate notwithstanding the general rules as to civil procedure enacted in Act X. of 1877. It is not competent, therefore, to Chanchallal, assuming the position of next friend without a due and legal recognition of his authority under the minors' Act, to carry into effect a decree made on behalf of a minor represented by another person duly authorized. He who cannot sue on behalf of a minor cannot, *a fortiori*, take the fruits of the suit.

*Civ. Ref. 13 of 1878 (p. 10 of P. J. 1879).



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BOMBAY HIGH COURT

1879
January 7.

Before Mr. Justice West and Mr. Justice Pinhey.

**KHUSHALDAS RANCHODDAS plaintiff v. WAMAN-
RAV, RAMRAV and Khusaba sons of Balwantrav,
minors, by their next friend Wamanrav Defendants.***

*Execution of decree against representative of deceased defend-
ant—Burden of proof.*

The representative of a deceased for the purpose of any suit or execution is his representative in relation, and only in relation to some property or power over property which has devolved on him in that character. There can be no representative of a deceased where there is no estate of the deceased and when execution of a decree is sought against a person as representative of a deceased judgment-debtor who denies that any property has come to his hands, the burden rests on him who asserts the representative's responsibility to prove affirmatively all the facts requisite to constitute it.

This is a reference under the provisions of Section 617 of the Code of Civil Procedure from the Judge of Ahmedabad, dated 2nd December 1878, and No. 775.

The answer to the first question propounded by the Subordinate Judge is, that the representative of a deceased for the purpose of any suit or execution is his representative in relation and only in relation to some property or power over property which has devolved on him in that character. Where there is no estate, it is impossible that there should be a representative of a deceased as to property which does not exist.

The answer to question 2 is, that when execution is sought against a person as representative in the sense above defined of a judgment-debtor deceased, who denies that any property has come to his hands, the burden rests on him, who asserts the alleged representative's responsibility, to prove affirmatively all the facts requisite to constitute it.

January 7.

Before Mr. Justice West and Mr. Justice Pinhey.

**MULTANCHAND SHIVRAM and others (Plaintiffs)
v. JOSEPH CHRICHEL (Defendant). †**

Procedure—Civ. Pro. Code. Act X of 1877, S. 5.

The reservations in S. 5 of Act X of 1877 under which some only of the subsequent sections of the Code are applicable to the proce-

*Civ. Ref. 14 of 1878 (p. 11 of P. J. 1879.) *

† Sin. C. C. Ref. No. 15 of 1878 (p. 13 of P. J. 1879).

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ture of Small Cause Courts are limited by the section itself to the Courts constituted under Act XI. of 1865, and have no application to other Courts even though these in any particular case may be exercising jurisdiction akin to that of the Small Cause Courts so constituted.

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MULTANCHAND
v.
JOSEPH.

This is a reference under the provisions of Section 617 of the Code of Civil Procedure from the First Class Subordinate Judge of Ahmednagar, dated 31st October 1878, and No. 197.

The reservations in section 5 of the Code of Civil Procedure under which some, and some only of the subsequent sections of the Code are applicable to the procedure of Small Cause Courts are limited by the section itself to the Courts constituted under Act XI. of 1865, and have no application therefore to other Courts even though these in any particular case may be exercising jurisdiction akin to that of the Small Cause Courts so constituted.

January 15.

Before Mr. Justice West and Mr. Justice Pinhey.

VYANKATRAV MADHAV, minor, by his administrator
Bhaskarrav Vyankatesh, *et al* (plaintiffs) Appellants
v. RAMCHANDRA NARAYAN (defendant)
Respondent. *

Jurisdiction—Pensions Act XXIII of 1871.

Where a Judge raises an issue at a late stage of the case as to the necessity producing a certificate under the Pensions Act XXIII of 1871, he ought not to refuse plaintiff permission to produce evidence which would show that no such certificate was necessary.

This is an Appeal from the decision of the First Class Subordinate Judge of Satara, in Original Suit No. 184 of 1872.

After this case had been under trial for nearly six years on thirteen issues which fairly covered, so far as can be seen, the merits of the case, the Subordinate Judge, on the application of the defendant, raised a fourteenth issue as to whether the suit was barred by the provisions of the Pensions' Act 23 of 1871, on account of no certificate having been produced from the Collector authorizing the Court to proceed with it. The plaintiffs objected to the question being entertained at so late a stage, and requested per-

* • Appeal No. 24 of 1878 (p. 14 of P. J. 1879).

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mission to produce evidence which would show that the part of the estate as to which the objection had been taken, the village of Bagni, had been enjoyed as a grant of lands not merely as a charge on the revenues produced by the village. The Subordinate Judge refused this permission, and without allowing to the plaintiffs time to obtain a certificate under the Pensions' Act, he proceeded, on the evidence before him, to decide that the suit was one that could not be entertained.

The decision of the Inam Commissioner in 1859 and the Resolution of Government in 1864 speak of the right which they establish over Bagni as Saranjam ; but they do not in terms confine the right to a charge on or an assignment of the revenues of the village. The "village" is to be made over and continued to the male descendant of Vyankatray Bhaskar and his heirs. The Inam Commissioner says "the village is to be continued as saranjam," but this "is not to interfere with the management (or enjoyment) of the village." *Prima facie*, a village means an area in a particular locality. Its definition is topographical, not pecuniary. When therefore a village is granted or the grant confirmed we should understand that subject to previously existing rights that the land was conferred. But a second intention of the word has grown up or has been deduced from the peculiarities of the Indian Revenue system, and so we find a village spoken of as granted when what was really meant was merely the Government land rent of the village. The mere word "village" can hardly, at any rate as used by British officers, be considered decisive of the fact of whether a grant or resolution means the one thing or the other. Saranjam too is a word the practical use of which appears to have become in some degree technical, though not with so certain a definition as to exclude doubt. It may mean a mere charge on the revenue or a benefit by way of bounty, or in return for service made good in some other way. The true sense of words such as these ought in every case to be determined by a consideration of all the circumstances, and in the case before us, when the Subordinate Judge raised a new and, as we must suppose, a distinct, substantial and necessary issue, he ought to have



allowed to the parties an opportunity on one side and the other of adducing evidence to show that the issue should be determined in favour of the plaintiffs or of the defendant. The mere language of the Resolution of Government, which now seems to form the chief title-deed of the Bagni property, is not enough to justify the decision of the Subordinate Judge. He has improperly excluded other evidence, and we must reverse his decision and remand the cause that evidence on the 14th issue may be received, and a new decision pronounced on the merits. All other questions are left open.

Costs to follow the final disposal of the case.

Before Mr. Justice Melvill and Mr. Justice Kemball.
GANESH PARASHRAM (plaintiff) Appellant *vs.*
RAGHO VISHNU and others (defendants)

Respondents. *

Evidence—Act I of 1872, Ss. 107—108—Presumption of death.

Sections 107 and 108 of the Indian Evidence Act have no application to a case where the question is not whether a particular person was dead at the time of the trial, but whether he was dead or presumably dead when an adoption took place before the Act came into force. The law then applicable would be the Hindu Law, and the shortest period which under that law raises a presumption of death is the period of 12 years from the date when the absent person was last heard of.

This is an Appeal from the decision of the Acting District Judge of Ratnagiri, in Appeal No. 334 of 1876.

We think that Sections 107 and 108 of the Indian Evidence Act have no application. The question is not whether Parashram was dead at the time of the trial, but whether he was dead, or presumably dead, when the adoption took place in 1868. The law on the subject at that time was the Hindu Law ; and the shortest period which under that law raises a presumption of death is the period of 12 years from the date when the absent person was last heard of. It is clear from the judgment of the District Judge that he was of opinion that the evidence did not prove that 12 years had elapsed, at the time of the adoption, since Parashram had last been heard of. We, therefore, affirm the decree of the District Court with costs.

* Appeal No. 309 of 1878 (p. 18 of P. J. 1879.)



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January 30.

Before Mr. Justice West and Mr. Justice Pinhey.

**RAMCHANDRA BAPUJI, minor, by his guardian
GANGABAI, widow of VISHNU BHIKAJI Ap-
plicant v. VINAYAK ANANT Opponent. ***

Execution of decree—Deceased defendant—Representative.

A decree can be executed against those persons only against whom the suit was directed, or their representatives.

This is an Application against the order of the Subordinate Judge of Rajapur, dated the 11th of October, 1877, in Darkhast No. 330 of 1877.

The order of the Subordinate Judge for execution against the share of Ramchandra must be set aside, that person not having been a party to the suit wherein the decree was passed which is now in course of execution. A decree can be executed against those persons only against whom the suit was directed, or their representatives, and, after the death of the defendant Vishnu, his name as defendant appears to have been replaced by that of Parashram alone, and only in his individual capacity. The decree is against Parashram alone and could not, under the circumstances, be against any one else. Neither therefore can it be executed against any other person's property. Rule made absolute.

Costs of this application to be borne by the opponent.

January 20.

Before Mr. Justice West and Mr. Justice Pinhey.

**GANESH KASHINATH et al (defendants 3 and 4) Ap-
pellants v. RAMCHANDRA BHIKAJI (plaintiff)
Respondent.†**

*Procedure—Amendment of plaint—Change in the nature of
claim—Mortgage, suit to redeem—Failure to prove mort-
gage—Another mortgage set up in defence—Objection
not raised in Courts below—Estoppel, by conduct—
Mortgage by brother.*

The plaintiff sued as assignee of an equity of redemption to redeem a mortgage made in 1819. The defendants denied this mortgage and in order to sustain their denial brought forward an earlier mortgage and their title having thus been disclosed the Courts proceeded to try the plaintiff's right to redeem that mortgage and the defendant did not ob

* Extra. Application 104 of 1878 (P. 21 of P. J. 1879.)

† Appeal No. 281 of 1878 (p. 22 of P. J. 1879.)



ject to this course being taken in the Courts below *Held* that it was too late to take the objection in second appeal that the plaintiff ought not to have been allowed to change his ground of action. The principles which govern questions of this kind are set forth in *Lakshmi Bai v. Hari* (9 Bom. H. C. R. 1) and according to them the plaintiff would have been allowed to amend his plaintiff if he could show that he had brought his suit in its original form through some excusable misconception under circumstances consistent with good faith. This rule would not allow a plaintiff in general after bringing a suit on a document, the proof of which entirely fails, to go on and succeed upon a title disclosed in the course of the defence.

The presumption of division arising from separate dealings by the members of a Hindu family is a strong one, and when in the course of those dealings a third party has been induced to enter into a transaction by the apparent assent of one brother to the separate ownership of another, and estoppel arises as against the one who has thus acquiesced either on account of his having no right or else with a view to further a fraud. Where, therefore, one of two undivided brothers wrote a mortgage of certain property which purported to be a mortgage by his brother alone, and made no mention of his share, and the mortgagee held possession under this separate transaction, it was held that the brother who had not joined in the mortgage and his representatives were estopped from setting up, as against the mortgagee, a right to redeem based on his continued union with his brother.

This is an Appeal from the decision of the District Judge of Ratnagiri, in Appeal No. 63 of 1876.

The plaintiff in this case sued as assignee of an equity of redemption from Ganesh Sadashiv to redeem a mortgage made in 1819 of a garden and field for Rs. 300 by Ganesh's father Sadashiv. The defendants sued as mortgagees and as persons in possession of the property, denied this mortgage, and it has by both Courts below, been held not proved.

On ordinary principles, therefore, the suit ought to have been rejected. But the defendants, in order to sustain their denial of the mortgage of 1819, brought forward an earlier mortgage to the grandfather of one of them in 1810; and their title having thus been disclosed, the Courts proceeded to try the plaintiff's right to redeem that mortgage. The Subordinate Judge held that the right did not subsist; the District Judge, on the contrary, that it did.

Before us it has been contended that the plaintiff could not entirely change his ground of action after the case had been fully placed before the Court on the one chosen by him. On the other side, the cases of *W. R. Arbuthnot* and others

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GANESH *Kunhi Kutti Nair vs Valia Pidigail Kunhamed Kutty*
v. *Maraccar and 5 others (2) have been relied on as justifying*
RAMCHANDRA. *the course taken and entitling the plaintiff to a consideration*
of the case as it now stands on the merits. The principles
which must really govern questions of this kind are set forth
in a way binding on us in the case of Lakshmibai and an-
other vs. Hari bin Ravji (3), and according to this, the plaint-
iff would have been allowed to amend his plaint if he could
show the Court that he had brought his suit in its original
form through some excusable misconception under circum-
stances consistent with good faith. This rule would not
allow a plaintiff in general after bringing a suit on a docu-
ment, the proof of which entirely fails, to go on and succeed
upon a title disclosed in the course of the defence. Nor
would it be safe to say that an assignee of a mortgage or
pretended mortgage, as not being acquainted with anything
beyond it, is as an innocent person entitled to unlimited in-
dulgence in speculative suits. Such a rule would very soon
bring about all the evils that could arise from alleged mort-
gagees suing and receiving a similar indulgence ; since an
assignee would in doubtful cases be put forward for the
very purpose of getting the preferred or possible benefit.
But the cases cited for the plaintiff, and especially the
Madras case, do strongly support the contention on his behalf.
The change in the nature of the suit as to the transaction on
which it was founded appears not to have been expressly
objected to by the defendants in either Court although it is
plain that they were fully aware of what was being done.
It is not named in the memorandum filed under Section 348
of Act VIII of 1859, and as the right to redeem under the
mortgage of 1810 has been fully gone into, we think that it
is too late now (this being a suit under Act VIII of 1859)
for the objection taken by the appellants to prevail.

As to the mortgage of 1810, we think that the District Judge has not dealt aright with the presumptions that the law raises in the case. The mortgage purports to be by Babaji alone. No mention is made in it of any interest except his. The document was written by his brother Sada-

(1) 6 B. L. R. 273. (2) 4 Madr. R. 359. (3) 9. B. H. C. 1.

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shiv. "Why was this done" the District Judge inquires "if not to show that it was a joint transaction?" It was done probably to show that Sadashiv being aware of Babaji's separate dealing with the property assented to it. Under this separate transaction the mortgagees and defendants Nos. 3 and 4 had held for a month short of 60 years when the suit was filed which led them to disclose it. Sadashiv being aware of the way in which Babaji had dealt with the property and having aided him in the transaction, could not afterwards set up as against the mortgagees a title based on his continued union with Babaji so as to give him a right to redeem. The presumption of division arising from separate dealings is a strong one, and when in the course of those dealings a third party has been induced to enter into a transaction by the apparent assent of one brother to the separate ownership of the other, an estoppel arises as against the one who has thus acquiesced either on account of his having no right or else with a view to further a fraud.

As against the mortgagee's representative, the defendant Nilkanth, therefore, the plaintiff deriving his right from Sadashiv's son, Ganesh, cannot rely on the union of Sadashiv and Babaji. They were severed for the purposes of the mortgage by the transaction itself. His assignment can have given him a right to redeem only as the heir or representative of Babaji though divided in interests from Sadashiv.

Babaji left a son Siddu who having disappeared about the year 1855, his funeral ceremonies were celebrated about 1865, and he was regarded as then deceased. In 1866, on a suit brought by the defendant No. 3, Ganesh K. Joshi, the widow Yeshoda's interest in her late husband's estate was put up to sale and was purchased by his brother Mahadev, defendant No. 4. The estate, so far as this suit is concerned consisted of the equity of redemption of the property mortgaged by Babaji in 1810 to Damodar now represented by his grandson Nilkanth. The District Judge, taking it as established that Babaji and Sadashiv and after them their sons Siddu and Ganesh were undivided in interest, has found that the money which in his evidence Ganesh says he advanced to the widow Yeshodabai obtaining as security a

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mortgage of her land, was really advanced by him as an undivided brother for the maintenance of his brother's deserted wife or widow. But this assumption of non-partition, contradicted by the transaction thus deposed to, as well as by other indications, besides the mortgage of 1810 cannot, as we have seen, be supported. Yeshoda, through her husband, inherited the equity of redemption which by Sadashiv's acknowledgment was vested to his exclusion in Babaji. Some collateral statements in documents executed by Ganesh and others to the mortgagees could not affect even them so as to bind them in any way to a recognition of Ganesh's claim as owner of the equity of redemption, as they were not answerable for irrelevant collateral statements introduced into their securities : though such statements accepted and acted on by them would at least be evidence of conduct (1). But how could these statements and this conduct affect Babaji, Siddu, Yeshoda, or the purchasers of her equity of redemption defendants No. 3 and 4 ? A mortgagee's interest stands apart from that of his mortgagor as to the person who may redeem, and he cannot by any word or act transfer the right from the person in whom it is really vested to another.

Whether the transactions of Yeshoda were such as a Hindu widow could properly enter into, and such that the estate of her husband inherited by her as a widow could properly be applied to the settlement of her obligations, are questions which may be of considerable importance hereafter. Those who buy from a widow, or purchase a widow's interest sold in execution, run a considerable risk of being ousted by the next heirs after her death, unless they have satisfied themselves as to the propriety of the transaction and the urgency of the occasion (2). But at present, Yeshoda is alive. Her interest during her life is at any rate answerable for her debts and the satisfaction of decrees made against her. When she dies the assignees of her husband's cousin may or may not be in a position to dispute the permanent right which the 3rd and 4th defendants say is vested solely in them as purchasers of her equity of redemption ; but for the present that question does not arise.

(1) See Taylor on Evidence, Ss. 84, 85.

(2) W. & B. p. 118 ff.



We must, therefore, reverse the decree of the District Judge and restore that of the Subordinate Judge with costs throughout on the plaintiff.

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Before Mr. Justice Melvill and Mr. Justice Kemball.

January 22. 1879

Appeal No. 372 of 1878. *

Limitation—suit to remove eaves.

A suit for the removal of beams constructed by the defendant in such a manner as to overhang the plaintiff's land must be regarded as a suit for possession of immovable property to which the period of limitation applicable is 12 years act complained of being a dispossession of the plaintiff from immovable property on the principle that the whole column of space superincumbent on the plaintiffs' land belongs to him.

If the act complained of be treated (as the District Judge has treated it) as a mere nuisance, it would be necessary to hold that the suit was barred by Act XIV of 1859, before Act IX of 1871 came into operation, for Clause 16, Section 1 of the former Act would be the only provision applicable to it. The claim, being once barred, could not be revived by the enactment of a new law of limitation. Nor even if the suit were not barred, when Act IX of 1871 came into operation, could Section 24 of that Act be made applicable, for the act complained of amounted to a trespass, and is, therefore, not a nuisance within the definition contained in Section 3 of the Act. But the suit is for the removal of certain beams constructed by the defendant's father in such a manner as to overhang the plaintiff's land and on the principle that the whole column of space superincumbent on the plaintiff's land belongs to the plaintiff, the act complained of is a dispossession of the plaintiff from immoveable property and the suit must be regarded as one for possession of immovable property, to which the period of limitation applicable is 12 years. This seems to have been the view taken by another bench of this Court in Second Appeal 292 of 1878 (1). The suit therefore is not barred, if it has been brought within 12 years from the date of the construction of the eaves ; but otherwise it is barred. There is no finding of the lower Court on this point, and the case must be remanded for such a finding.

The defendants alleged that the eaves were constructed

P. 27 of P. J. 1879.

(1) 3 Bom. 174.

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with the consent of the plaintiff's father, and endeavoured to prove that such consent was given for a valuable consideration. This question was raised in the memorandum of appeal, but has not been noticed by the lower Appellate Court. It will be necessary that the District Court should consider and determine this question ; and should also determine whether the consent of the plaintiff's father, if proved, is binding upon the plaintiff.

The District Court is accordingly directed to find (on the evidence on the record) on the following issues.

Has the plaintiff proved that the present suit was brought within 12 years from the date on which the eaves complained of were constructed by the defendant's father ?

If so, have the defendants proved that the eaves were constructed with the consent of the plaintiff's father, and that such consent is binding upon the plaintiff ?

January 27.

Before Mr. Justice Melvill and Mr. Justice Kemball.
GANESH SADASHIV (plaintiff) Appellant v. BAL-
KRISHNA GOPAL and others (defendants)

Respondents. *

Mortgage—Puisne mortgagee's right to redeem after foreclosure decree—Accounts.

The purchaser of an equity of redemption, or a subsequent incumbrancer, has a right to redeem a prior mortgage even after a foreclosure decree obtained by the latter in a suit to which the mortgagor alone has been made a party, owing to the prior mortgagee having had no notice of the sale of the equity of redemption or subsequent mortgage ; but the purchaser or puisne mortgagee may be bound by the decree obtained in such suit as to the accounts.

This is an appeal from the decision of the Acting Assistant Judge of Tanna, in Appeal No. 362 of 1877.

The respondents' pleader has failed to point out to us anything in Balkrishna Railkar's accounts, which would justify the Assistant Judge's finding that the transaction effected by Exhibit 13 was a mortgage, and not a sale. But the question is immaterial, because, whether Balkrishna Railkar was a purchaser of the equity of redemption, or only a subsequent incumbrancer, he had equally a right to redeem Khandrav's mortgage, and ought to have been made a party to

* Appeal No. 350 of 1878 (p 28 of P. J. 1879.)



Khanderav's suit for foreclosure. It is said that Khanderav had no notice of Exhibit 13 ; but the document was registered ; and even if it be admitted that registration did not constitute notice, yet the want of notice would not, we think, deprive Balkrishna Railkar of his right of redemption, though the decree obtained by Khanderav against the mortgagors in Balkrishna Railkar's absence might bind Balkrishna Railkar as to the accounts (1). The plaintiff who stands in Balkrishna's place does not dispute the accounts, and is ready to redeem Khanderav's mortgage on the footing of the decree obtained by Khanderav in the foreclosure suit. We, accordingly, reverse the decrees of the Courts below, and decree that within six months from the present date, the plaintiff do redeem Khanderav's mortgage by payment of Rs. (232-12-0) two hundred and thirty-two and annas twelve, and the costs awarded in suit No. 845 of 1873, and he thereupon put in possession of the property in dispute, and that in default of payment within the time specified, he be for ever foreclosed. Each party to bear his own costs throughout.

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Before Mr. Justice West and Mr. Justice Pinhey.
ACHRATLAL GIRDHARLAL et al (defendants)
Applicants v. The GUZERAT S. and W. Co. Ltd.
(plaintiffs) Opponents. *

January 29.

Procedure—Transfer of a civil suit from Mofussil to High Court.

An application for the transfer of a civil suit from a Mofussil Court to the High Court may be regarded as one made to the High Court in its original jurisdiction and according to Ss. 13 and 14 of Stat. 24 and 25 Vic., C. 104, and the Rule Chapter II, s. 4 of those made under that Act, should be dealt with either by a single Judge or a Division Court constituted according to the determination of the Chief Justice as to the class of cases to be taken by each Judge either singly or in a Division Bench.

This is an application for the transfer of Suit No. 2664 of 1877 of the file of the First Class Subordinate Judge of Ahmedabad to the High Court.

When the present application came on for hearing on this day week, an objection was taken that it being intitled

* Civ. Application No. 18 of 1879 (p. 29 of P. J. 1879.)
(1). Fisher on Mortgage, Sec. 1032.



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as in Appeals Nos. 13 and 14 of 1878, the opposing company, if it was held that their pleader must file a fresh vakalatnama as on a new application, were entitled to costs of the day. It was obvious that a mistake had been made in intitling the application as in appeals which had been disposed of, and eventually it was agreed that the application being treated as an original one, the opponents' pleader should file a vakalatnama. The hearing then proceeded on that footing.

It was objected by Mr. Inverarity, for the opposing company that the application, regarding it as one not made in an appeal ought to have been made at the Original side of the Court. The term 'Original Side' is one only of convenience denoting the Benches which usually dispose of original suits and the applications connected with them. An application such as this is, for the transfer of a suit from a Mofussil Court may be regarded as one made to this Court in its original jurisdiction, and according to Sections 13 and 14 of the High Court's Act (24 and 25 Vic. c. 104) and the Rule, Chapter II. Section 4, of those made under the statute, should be dealt with by either a single judge or a division Court constituted according to the determination of the Chief Justice as to the class of cases to be taken up by each judge either singly or in a division Court. In the present instance there had been no express determination by the Chief Justice that the Judges of this division Court should be a division Court for the purpose of exercising the the branch of the original jurisdiction which consists in dealing with applications for the transfer of original suits ; but he has now, on the matter being brought to his notice, constituted us a Court for this purpose. Any question as to jurisdiction is thereby prevented. An opportunity has been offered to the parties to reargue the case now, but they having assented to our disposing of it on the arguments previously laid before us, we proceed to a decision.

The case is one in which two defendants are sued as liable in the capacity of shareholders in the Guzerat Spinning Company on the ground that they signed the original memorandum of association of the company. The defence is



that this was merely a provisional document ; that the signatures to it expressed only an intention not an engagement ; that the memorandum actually registered and constituting the company was not signed by the defendants, and that before its registration they had changed their intention, withdrawn their consent to be sharers in the proposed undertaking, and renounced all connection with it. It appears from what was said before us, on the occasion of our hearing Appeals Nos. 13 and 14, that the questions arising on these contentions are of some difficulty. The able counsel retained on either side could not on that occasion produce decisions of the English Courts on the Joint Stock Company's Acts which would enable us forthwith to pronounce on the rights and obligations of the parties, assuming the facts as stated on either side to be true. The Mofussil Courts have but little experience in cases of this kind. Their bar is but imperfectly instructed for the due discussion of the questions that arise, and the means of information are not readily accessible. It seems desirable, apart from the questions of expense and of evidence, that such cases should be tried in the High Court rather than in the Court of a Subordinate Judge.

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As to the taking of evidence there is undoubtedly a certain disadvantage in trying a suit at a distance from the source of the litigation. Some of the witnesses might have to be examined on commission, who at Ahmedabad could be examined in the Court itself. On the other hand, the examination would, in a trial by the High Court, probably be much more skilfully directed in the first instance to eliciting the facts of real importance. If it should prove necessary in a regular appeal for the High Court to direct a further examination of witnesses or to call them up for examination before the Court, there would probably be no advantage gained in point of convenience, while the disadvantages in other respects are sufficiently obvious.

These disadvantages would possibly be obviated to some extent by the parties retaining competent counsel to represent them in the Mofussil Court, but in that case the expense of the trial and the almost certain appeal would probably be



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S. AND W. Co. greater than that occasioned by calling the case up to this Court. The language of the Subordinate Judge's Court, moreover, being Gujarathi some delay and embarrassment might arise from that source.

The file of the Subordinate Court at Ahmedabad, is as we know, loaded with suits, the hearing of which would probably cause a delay of two years or thereabouts in the disposal of the present case. In the meantime, the property of the defendants has been attached and they are thus subjected to an inconvenience and loss which would be but inadequately compensated in all probability should damages eventually be awarded to them for a needless attachment. In the High Court a tolerably speedy disposal of the suit may be anticipated.

For these reasons, we direct that, as applied for, the suit be transferred from the Court of the Subordinate Judge to this Court for disposal in the exercise of its original jurisdiction. The interlocutory orders made in the case by the Subordinate Judge are to stand good until set aside or varied by this Court.

Costs of this application and in the Court below to be costs in the cause abiding the final order of this Court.

January 30.

Before Mr. Justice West and Mr. Justice Pinhey.

VENA, widow of TUKARAM BAPUJI Applicant v.
ABIR SARFUDIN Opponent. *

Execution of decree, Possession of property purchased at sale in—Intoxication.

Delivery of possession of immovable property purchased at an execution sale cannot be made while the person in possession is in a state of unconsciousness from intoxication.

This is an application against the order of the Subordinate Judge of Kalyan, dated the 4th of July, 1878, on application No. 605 of 1878.

It appears from the report made to the Subordinate Judge by the Clerk of the Court on an inquiry which the Subordinate Judge ought to have made in person, that Tukaram being in possession of the field in question resisted delivery of it to the execution-purchaser Abir Sarfudin. The resistance

* Extra. Application 111 of 1878 (P. 32 of P. J. 1879).



was held unavailing by the Subordinate Judge on the ground that Tukaram had been intoxicated when it was made, and he referred Tukaram to a suit. Tukaram, however, being in possession either effectively resisted (according to Section 332, C. Civ. P.) the delivery and ought not to have been turned out, or else being unconscious was not deprived of a possession vested in him by what, so far as he was concerned was an unmeaning ceremony. It was as if he had been asleep in his field, and possession could not be transferred to another by a mere ceremony gone through while he though present was in that condition. His loss of possession would occur only when on awaking or recovering consciousness he found himself effectively excluded when he desired to re-enter or re-enjoy the land, though if such exclusion were justifiable it would relate back to the moment of adverse occupation, and the person who had gone through a vain ceremony during his unconsciousness would not on that account be in any better position for resisting him. It seems doubtful whether Tukaram was really dispossessed in a way that the Court ought to recognize, or whether if he was dispossessed he was not entitled to be forthwith restored. The Subordinate Judge will, by accurate inquiry into the facts, ascertain the precise circumstances of the alleged delivery to Abir Sarfudin, and make an order accordingly for his continued possession or for that of the petitioner.

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Costs of this application to abide the final order.

Before Mr. Justice Melvill and Mr. Justice Kemball.

February 3.

**YESAJI BALAL (plaintiff) Appellant v. GANESH
BALLAL (defendant) Respondent. ***

Contract—consideration.

The exclusive enjoyment by the defendant of the whole of land, admittedly the joint property of himself and plaintiff, is sufficient consideration for the defendant's promise to give the plaintiff one-half of the produce.

This is an appeal from the decision of the Acting District Judge of Ratnagiri, in Appeal No. 312 of 1876.

It seems to us impossible to say that there was no consideration for the promise contained in Exhibit 3. The exclu-

²Appeal No. 399 of 1878 (P. 34 of P. J. 1879.)



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sive enjoyment by the defendant of the whole of the land which was admittedly the joint property of himself and the plaintiff, was sufficient consideration of the defendant's promise to give to the plaintiff one-half of the produce. The respondent's pleader, before this Court, has relied not so much on the plea of want of consideration, as upon an alleged agreement that Exhibit 3 should not take effect until the plaintiff handed over to the defendant a half share of the moveable property belonging to the family. It might no doubt have been open to the defendant to allege and prove such a condition precedent to the attaching of the obligation contained in Exhibit 3 : but we cannot find that he made any such case in the Courts below, and the evidence on which he relies would certainly not prove the existence of any such condition precedent. Under these circumstances, we can see no reason why the defendant should not be held to his agreement contained in Exhibit 3 : and we therefore reverse the decrees of the Courts below, and award the claim. The defendant to bear all costs in the Courts below. The parties to bear their own costs in second appeal.

February 3.

Before Mr. Justice West and Mr. Justice Pinhey.
BALSHASTRI GANGADHARBHAT (defendant)

v. HARI SADASHIV, purchaser of the right,
title and interest of Rakhmabai, widow and
heir of Vithoba Pore (plaintiffs)

Respondent. *

Right to sue—Decree, execution whereof barred by limitation—suit for property, title to which declared by.

The plaintiff's assignor obtained a decree on a mortgage whereby she became entitled as against U. and others to possession of a house. Resistance was offered by S. and the judgment creditor having applied to the court, her right to possession was affirmed. S. then sued to establish her right, but the suit abated by her death and the judgment creditor then seeking possession in accordance with the decree and the order against S. was resisted by the present defendants who had taken under S.—Held, that although execution of the decree obtained by the plaintiff's assignor was barred by limitation, yet the right created or established by a judicial order in the course of the execution already had was not therefore extinguished. The enactment which gives to an unsuccessful party in an application arising out of resistance to execution one year within which to sue to establish

* Appeal No. 307 of 1878 (p. 35 of P. J. 1879).



his right, does not either directly or by analogy impose upon the successful party the necessity of actually turning the other out within the same time. A title once established, though in a suit incapable of execution through lapse of time, is still binding on the parties in future litigation. The judgment-creditor having an order for possession, against S. her right of entry thus established and that of her assignee would not apparently be barred in less than twelve years. New opponents having arisen, the assignee of the judgment-creditor's rights had to sue them to establish his title.

This is an second Appeal from the decision of the District Judge of Satara. in Appeal No. 166 of 1877.

The plaintiff's assignor Rakhmabai obtained a decree on a mortgage whereby she became entitled as against Umabai and others to possession of a house at Wai. Resistance was offered by one Salubai, and the judgment-creditor having applied to the Court, her right to possession was affirmed. Salubai then filed an application which was converted into a regular suit to establish her right. The judgment-creditor pending this suit forbore to take advantage of the order in her favour which it was sought to upset, and in December 1871, when the conversion of Salubai's application into a suit took place, she was told that she might bring a fresh application for execution after that suit was disposed of. The suit abated by the death of Salubai, and the judgment-creditor then seeking possession in accordance with the decree and the order against Salubai was resisted by the present defendants.

He assignee, the present plaintiff Hari Sadashiv, now sues for possession the defendants, who admit that they take under Salubai. But as execution against Salubai, as they urge, was barred by Act IX of 1871 on account of the lapse of more than three years since the last application for execution had been made even when the order of December 1871 was passed, they cannot now be proceeded against in execution nor consequently by a suit. Salubai's suit however was founded on the very fact that as against her the right of the judgment-creditor was established for ever unless set aside by means of that suit. It was not set aside, and thus the title as against representatives of Salubai is confirmed. The title thus subsisting when the judgment-creditor found new persons in possession, she proceeded aright in suing them to establish her title. Execution of the original decree was

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barred by limitation, but the right created or established by a judicial order in the course of the execution already had was not therefore extinguished. The enactment which gives to an unsuccessful party in an application arising out of resistance to execution one year within which to sue to establish his right, does not either directly or by analogy impose on the successful party the necessity of actually turning the other out within the same time. No case has been cited which imposes such an obligation, while that of *Ram Soon-daree vs. Ram Pershad* (1) says that a title, once established, though in a suit become incapable of execution through lapse of time, is still binding on the parties in future litigation. The judgment-creditor having an order for possession against Salubai, might at any moment have entered under it. Her right of entry thus established and that of her assignee would not apparently be barred in less than twelve years. A fresh application for execution of the original decree was not necessary where there was an order already subsisting unreversed : but new opponents having arisen, the assignee of the judgment creditor's rights had to sue them to establish his title. This he has done and the suit was not barred. We, therefore, confirm the decree of the District Court with costs.

February 27.

Before Mr. Justice West and Mr. Justice Pinhey.

BAJI SHAMRAJ (plaintiff) Appellant v, DEV BALAJI
(defendant) Respondent.*

Hindu Law—Alienation of ancestral property.—Mortgage by manager of undivided family.

The authority of a manager of a joint Hindu family to alienate or charge the estate is a limited authority. A mortgage of the joint land by the manager to buy cattle would not be a sufficient reason in ordinary circumstances to justify the creation of a charge on the estate without the assent of the other co-parceners.

This is a second Appeal from the decision of the Joint Judge of Tanna in Appeal No. 466 of 1877.

The authority of a manager to alienate or charge the family estate is a limited authority. In this case it is said that Babaji mortgaged the land in dispute to buy cattle, but

*Appeal No. 367 of 1878 (P. 238 of P. J. 1879.)

(1). 8 W. R. 288.

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that would not be a sufficient reason in ordinary circumstances to justify the creation of a charge on the estate without the assent of the other co-sharers. Their assent was not obtained, and it is found that a dispute was going on which resulted a few days after the date of the mortgage in a partition. It would require strong evidence of special circumstances, believed to exist by the mortgagee, to support this transaction when sought to be enforced several years afterwards against a divided member. Such circumstances are not proved in this case, and the mortgagee did not take the most natural and obvious precaution of asking Babaji's co-sharers whether they assented to his act. In his subsequent suit to enforce his mortgage, the plaintiff, if he wished to make the present defendant responsible, ought to have joined him as a party. It is urged that he is entitled to Babaji's share of the estate and therefore of the land in dispute. He was satisfied, however, with suing Babaji alone, and against Babaji alone can he execute a decree obtained in that suit. The present defendant Dev's land is answerable or not according to circumstances which we have already considered, but the liability could not be enforced without Dev's having a hearing on the validity of the mortgage when the plaintiff sued to enforce it.

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We confirm the decree of the District Court with costs.

Before Mr. Justice Melvill and Mr. Justice Kemball.

February 17.

HARIBHAI MOTIRAM et al (defendants) Appellants
v. DHANJISHA NASARVANJI and Manekji
HORMASJI, owners of Manekji Dhanjisha's
Company (plaintiffs) Respondents.*

Partnership—Purchase of partner's Share in partnership property.

A purchaser of a partner's right to share in certain partnership property is not liable for the debts of the firm, nor does he become substituted for his vendor as a partner.

This is a second Appeal from the decision of the Acting Assistant Judge of Surat, in cross Appeals Nos. 125 and 132 of 1875.

The defendants 2 and 3, Haribai and Jechand, are not

* Appeal No. 290 of 1878 (p. 241 of P. J. 1879.)



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personally liable for any debt due by the firm of Ardasir and Kuber Bhula. All that they purchased was Kuber, Bhula's right to a share in certain partnership property and such share would become available to them only in the event of the property, remaining as assets for division, after the settlement of accounts between the partners, and the payment of creditors. The Assistant Judge was in error in supposing that, as purchasers, defendants 2 and 3 were substituted for Kuber Bhula as partners in the firm, and rendered liable for debts due by the firm. We amend the decree of the Assistant Judge by exempting defendants 2 and 3 from liability, and by declaring the amount awarded by the Assistant Judge to be recoverable from defendant 1, Ardasir, and from the property of the firm of Ardasir and Kuber Bhula. The plaintiffs to bear the costs of defendants 2 and 3 throughout. The plaintiff's costs in the Courts below to be borne by the 1st Defendant Ardasir.

February 18.

Before Mr. Justice West and Mr. Justice Pinhey.

NARAYAN PALVANTRAV deceased, his son and heir **SAKHARAM** (plaintiff) Appellant *v.* **BA-LU VITHU** (defendant) Respondent. *

Landlord and tenant—Khote lands—Bom. Act I of 1865, Ss. 34 and 38.

In 1865 the defendant became tenant of certain *Khote* lands for one year. The management of the village was assumed in 1866 by the Collector which continued till 1872 ; and during this time the defendant held on the same terms of payment as the other ryots of the village. On a right construction of s. 34 of the Survey Act I of 1865, held that the defendant could not thus acquire any rights as against the *Khotes* on their restoration other than those, if any, arising from his mere occupation for six years. No right could thus be created in the defendant's favour which would prevent the *Khote*, who was owner and entitled to possession in 1866 from being equally owner and entitled to possession in 1872, provided the defendant was allowed to work out his current year of cultivation and remove the crop he had sown by license of the then manager of the estate.

An order of the Settlement Officer under s. 38 of the Survey Act to fix the demand of the *Khote* on the tenant, could not bind the ryots to the land against their will, and could not reduce them from the position of free tenants to *adscripti glebæ*. Having accepted the position of

*Appeal No. 419 of 1878 (p. 243 of P. J. 1879.)

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a mere temporary contractual tenant instead of a guranteed tenant under the Act, the defendant was bound to surrender the land to its owner.

This is an Appeal from the decision of the Joint Judge of the District of Tanna, in Appeal No. 540 of 1877.

The Joint Judge has found that the kabulayat of December 1865 passed by the defendant Balu to the plaintiff Sakham and other khotes is genuine. By this, Balu undoubtedly accepts the position of a tenant holding by contract for the current year only, and binds himself to surrender the land at the end of the cultivating season in the month of Poush. The land was then demanded, but not, apparently, given up. The management of village was assumed in 1866 by the Collector in consequence of a dispute with the khotes, and this management continued down to 1872. During that time Balu appears to have held on the same terms of payment as the other ryots of the village, but, on a right construction of Section 34 of the Survey Act, he could not, in our opinion, thus acquire any rights as against the khotes on their restoration other than those, if any, arising from his mere occupation for six years. No right, however, could thus be created in Balu's favour, which would prevent the khote, who was owner and entitled to possession in January 1866, from being equally owner and entitled to possession in 1872, provided only that Balu was allowed time to work out his current year of cultivation, and remove the crop he had sown by licence of the then manager of the estate.

It has been contended that as Section 38 of the Bombay Survey Act empowers the Settlement Officer "to fix the demand of the khote on the tenant," and this power was exercised between the parties to this suit, the defendant may claim to hold all through the current term of settlement provided he pay the rent thus fixed, And had he been content to rely on the order of the Settlement Officer, this might have been so. But such an order could not bind the ryots to the lands against their will. It was not intended to reduce them from the position of free tenants to *adscripti glebæ*. Having then liberty to give up their tenancies, they could give them up by entering on new ones. They might renounce the advantage given to them by the legislature.

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This, according to the finding of the Joint Judge, is what the defendant Balu has done. He accepted the position of a mere temporary contractual tenant, instead of a guaranteed tenant under the Act ; and there was no enactment which would benevolently guard him against such a transaction and its consequence. He is bound to surrender the land to its owner, and we must reverse the decree of the Joint Judge and award to the plaintiff possession of the land as claimed. Each party to bear his own costs throughout,

March 4.

Before Mr Justice Melvill and Mr. Justice Kemball.

SANGANBASAPA CHAVDHARAPA (defendant) Appellant v, SANGAPA CHAVDHARAPA (Appellant) Respondent.*

Custom—Patilki family—Eldest member officiates—Bom. Reg. IV of 1827, S. 26.

The practice for the eldest member of a Patilki family to officiate is not the usage of a single family but of a large number of families forming an important class of the community and such a custom if clearly proved may well be regarded as part of " the usage of the country," which, by S. 26 of Bom. Reg. IV. of 1827, the Courts are bound to recognize and enforce.

This is an Appeal from the decision of the Senior Assistant Judge of Belgaum at Kaladgi in Original Suit No. 5 of 1874.

We think it is clear, on the evidence, that in the family to which the parties belong the duties of the Patil's office have been performed since 1807 by the father of the parties, and by the defendant or his nominee, as being the eldest member of the family : and Exhibit 16 shows that in 1807, it was admitted by those members of the family who had an interest in denying it, that this had been the usage of the family from generation to generation and it was on the strength of this usage that the right was conceded to the father of the parties. The usage being thus, in our opinion, sufficiently proved, it is one to which we think that we ought to give effect. The Assistant Judge has referred to the case of Bhau Nanaji Utpat vs. Sundrabai, wife of Dhondra

*Appeal No. 42 of 1878 (P. 257 of P. J. 1879.)

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Govind (1) : but the decision which appears to us really to govern the present case is that of Shidhojirav vs. Naikojirav (2). The practice for the eldest member of a Patilki family to officiate is, as was said in that case, not the usage of a single family, but of a large number of families, forming an important class of the community (3) and such a custom, if clearly proved, may well be regarded as part of "the usage of the country," which, by Section 26 of Regulation IV of 1827, our Courts are bound to recognize and enforce.

We reverse the decree of the Court below and reject the claim with costs.

March 6.

Before Mr. Justice West and Mr. Justice Pinhey.
VRIJBHUKHANDAS KIRPARAM (defendant No. 2)
Appellant v. KIRPARAM GOVANDAS and Pran-
valabh Govandas (plaintiff and defendant No. 1)
Respondents.*

*Hindu Law—Alienation of ancestral property, by
manager as his sole property.*

Where the manager of an undivided Hindu family sells a part of the family property as his own sole property and not as exercising or professing to exercise his authority as manager, and the purchaser who takes it without taking the trouble to make any enquiries from the other parceners, cannot afterwards rest on his vendor's authority as manager and cannot acquire more than his vendor's share.

This is a second Appeal from the decision of the Acting Assistant Judge of Surat, in Appeal No. 195 of 1876.

The vendor Pranvalabhdas, though really still united in interest with his brother Kirparam, sold to Vrijbhukhandas the shops and house now in dispute as his own sole property. Vrijbhukhandas, who purchased the property from Pranvalabh in that character without taking the trouble to make any inquiries of the brother Kirparam, cannot now rest on Pranvalabh's authority as manager. That authority might be sufficient in certain cases to support his alienation of the property belonging to the family, which was one engaged in mercantile pursuits (4), but Pranvalabh was not exercising or professing to exercise it.

* Appeal No. 342 of 1879 (p. 263 of P. J. 1879.)

(1) 11 B. H. C. 249.

(2) 10 B. H. C. 228.

(3) See Steele's laws and customs of Hindu castes, page 229.

(4) See W. and B. H. L. 2nd Edition pp. 290, 342.



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He could however effectually sell his own share in the family estate, and so far as that share extends, the vendee Vrijbhukhandas may take the benefit of his purchase. Kirparam himself values the whole property at Rs. 1, 400. That purchased by Vrijbhukhandas he values at Rs. 800. If Kriparam therefore receives from Vrijbhukhandas Rs. 100, he will, so far as that defendant is concerned, have received all that is necessary to make up, along with the other unsold property, his moiety of the whole as valued by himself. In the present appeal we are not concerned with the adjustment of the shares of Kirparam and of Pranvalabhdas in the houses which will thus be left to them. In any distribution of the property, the Rs. 100 now ordered to be paid by Vrijbhukhandas as a condition of his retaining the property bought by him must be taken into account as between the two brothers.

The parties respectively to bear their own costs of this appeal.

March 10.

Before Mr. Justice West and Mr. Justice Pinhey.
**ABDUL RAHMAN Nurbhai (plaintiff) Appellant v.
KHUDABAKSH USMAN et al (defendants)**

Respondents. *

*Alienation by guardian—Mahomedan Law—Mother and
de facto guardian of minor, sale by—Objection not
taken in Courts below.*

Where on a wide issue of validity, the contentions of the parties and the mind of the Court had been directed only to alleged invalidity arising from particular causes which had been dealt with, it was not competent in special appeal to rest an objection on a ground included indeed within the class of those which would support the objection, but which had not as a matter of fact been taken or thought of as a cause of invalidity in the Courts below.

Where therefore objection was taken in the Courts below to the validity of the sale by the mother and *de facto* guardian of a minor, but not on the ground that according to Mahomedan Law she was not competent to assume the office of administratrix to her infant son's estate, and therefore had no power to sell it and where the sale had been made in good faith and under the pressure of a necessity which would have otherwise in all probability led to the extinction of the minor's estate, it was held to be too late to take such an objection in appeal.

* Appeal No. 15 of 1879 (p. 264 of P. J. 1879).

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This is an appeal from the decision of the District Judge of Ahmednagar, in Appeal No. 126 of 1877.

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The sale in this case appears to have been made in good faith and under the pressure of a necessity which would have otherwise in all probability led to the extinction of the plaintiff's interest. He was at the time a minor, and his mother sold the property to compromise claims which, if enforced in the Civil Court, would, so far as can be seen, have swallowed it all up. But it is objected that the sale was made by a Mahomedan widow and that she not being competent according to the Mahomedan law to assume the office of administratrix to her infant son's estate, the sale made by her was essentially invalid. It may be that under the strict Mahomedan law Manabai was not properly guardian and administratrix with full authority to deal with the estate, but, on the other hand, she was evidently guardian *de facto* ; and the custom of Ahmednagar, as of many other districts, may sanction a deviation in this particular from the strict Mahomedan law. It would certainly tend to loss and litigation if in the case of very petty property of a poor Mahomedan family, the mother was excluded from the guardianship and administration, except when expressly appointed by a Court. The question however, of the legal capacity of the mother for the post of guardian was not distinctly raised or considered in the Courts below, and in omitting to deal with it, those Courts must have satisfied the real views and wishes of the parties, as otherwise the latter would have applied for a review of judgment. It is contended that in objecting to the validity of the alienation by Manabai, the plaintiff put the defendants upon proof of every possible circumstance requisite to sustain the sale, and implicitly raised every legal exception that could be taken to her acts bearing on the property in question, but in the case of Ameeroun Nissa Khatoon *vs.* Mt. Abedoonissa Khatoon, decided by the Judicial Committee on 30th January, 1875, (1) it was ruled that where on a wide issue of validity, the contentions of the parties and the mind of the Court had been directed only to alleged invalidity arising from particular causes which had been dealt with, it was not com-

(1) 15 Beng. L. R. 67.

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petent in special appeal to rest an objection on a ground included indeed within the class of those which would support the objection, but which had not as a matter of fact been taken or thought of as a cause of invalidity in the Courts below. So here, although no doubt the objection that Manabai's sale was invalid was one that could have been supported on various grounds, but the one really contemplated and dealt with was that, being guardian and administratrix, she had not had authority to deal with the property. On the point of whether she was capable of being guardian no question was raised. The reason may have been that a local custom would have been referred to which would at once have settled the point in favour of the vendees ; but at any rate the point having been waived below cannot now be raised because an objection actually made might have been construed so as to include it. The question is not what the objection might possibly have meant, but what it really did mean, and that its meaning was rightly apprehended, there is no reasonable doubt.

That a dealing with an infant's property by a mother as guardian may, under circumstances, be sustained appears from the case of Massamut Syedun *vs.* Syud Velayat Ali Khan (1), and as it can be sustained, it ought, on the findings as to facts, to be sustained in this case. We therefore confirm the decree of the District Court with costs.

April 16.

Before Mr. Justice Melvill and Mr. Justice Kembball.

VASUDEV BHASKAR (plaintiff) Appallant *v.* The
Collector of Thana (defendant) Respondent.*

*Timber, right to cut—Wurkas land—Profit a prendre—
Custom—Prescription—Joint survey Rules, Rule X.*

It is now settled law that all waste land belongs to the State and wurkas lands must be regarded as to all intents and purposes waste lands.

The fact that a sutidar's wurkas lands have always been marked off by distinct boundaries from the wurkas of his neighbours with the knowledge of Government officers who have never interfered with his exclusive enjoyment of them will not be a recognition by Government of the proprietary title of such sutidar in the wurkas lands. The soil of such lands being the property of Government the Sutidar cannot

-Appeal No. 48 of 1878 (P. 274 of P. J. 1879.) *

(1) 17 Calcutta Weekly Reporter, 239.



either by custom or prescription, acquire an unlimited right to cut down trees growing upon that soil. A *profit prendre* in another's soil cannot be claimed by custom, however ancient, uniform and clear, the exercise of that custom may have been ; and an unlimited *profit a prendre* on another's soil cannot be claimed by prescription.

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Previously to the introduction of the Revenue Survey in the Thana Collectorate, the felling of teak trees was universally prohibited and that the right of Government to do this was never questioned ; the right to all other trees, standing on or to be afterwards planted on, their own lands was conceded to the occupants. Wurkas lands were not treated as private lands, but as Government waste ; the right of the cultivators to take *rab* from those lands for manuring their rice fields was recognized, but they were prohibited from felling upon these lands trees of certain specified descriptions, although as a favour and not as a right they were permitted to cut common wood for domestic use, but not for trading purposes. Rule X of the Joint Survey Rules was not introduced into the Konkan or was introduced with a reservation of the Government rights in "am, teak, sisav and other trees."

The holders of rice fields in the Konkan whatever may be their tenure of such fields are not the proprietors of the soil in the wurkas lands held by them and are not entitled by custom or prescription or by any grant or recognition on the part of Government to cut down teak, or other specially reserved trees growing on wurkas lands of which they are occupants.

This is an appeal from the decision of the District Judge of Thana in Original Suit No. 24 of 1875.

This suit was brought by the plaintiff to establish his right, as against the Government, to cut down all trees growing upon certain lands held by him in the Nasrapur or Karjat Taluka of the Thana District.

The lands in question are partly rice lands, and partly 'wurkas.' The 'wurkas' is land on which, in accordance with the mode of cultivation in use in the Konkan, the cultivators cut grass, brushwood, and branches of trees, to be burned as manure (*rab*) on their rice fields. This, and not cultivation, is the use to which 'wurkas' land is ordinarily appropriated : but patches of such land are from time to time used for raising scanty crops of inferior grain.

The District Judge has declared the plaintiff "entitled to the trees on his rice land, as conceded by the defendant," but has rejected the claim to trees growing on the 'wurkas' land. •

The case has been tried by the District Judge with great



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care, and the able and lucid manner in which he has discussed the questions at issue leaves little to be desired. We think, however, that it would have been well if he had required the Collector to put in a written statement, or if he had examined his Counsel, with a view to obtain a more precise statement of the exact nature and extent of the concession made by the Collector. The " preliminary statement " recorded by the District Judge as having been made by the defendant's Counsel at the commencement of the case is not very clear ; and it has been represented to us by Mr. Leith that he was to a certain extent misunderstood. He did not intend (as the District Judge thought) to concede on behalf of the Collector that the plaintiff is entitled, as of right, to cut trees on his rice land. Such right was contested by Government in another case, known as Atmaram Tipni's case : and though the decision in that case was against the Government, and was not appealed against, yet the Government has since published a Resolution, which shows that they are by no means prepared to acquiesce in a repetition of the same decision in other similar cases. In this Resolution (Exhibit 302) they say " The Collector should be informed that " Government consider they are now in a position to maintain in a Civil Court their right to all teak and blackwood trees in the Northern Konkan, which they, in consequence of imperfect enquiries, were not, when the Tipnis' case was decided, and will therefore be prepared to support the action of the Collector in stopping the cutting of such trees, in all Sarkari lands without permission. The Collector may be authorized to give permission in rice and garden lands, but instructed to refuse it in all other lands in which the trees have not been bought from Government." It is clear that the Collector would have contravened the distinct orders of the Government, as contained in the above Resolution, if he had made a concession in this case that the holder of rice fields is " entitled " to all trees growing thereon. The Collector, through his Counsel, apparently intended to concede no more than this, viz., that having been, by the above Resolution, authorised to give permission to cut trees in rice lands, he was willing to give permission to the plaintiff to cut trees so situated. This is of course a very different

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thing from conceding, as stated in the District Judge's decree, that the plaintiff is entitled to the trees on his rice land. The question is not very material in the present case, because the Collector does not wish to deprive the plaintiff of the decree which he has obtained : but we think it necessary to notice the matter, lest in any future case this decree should be used against the Government, as containing evidence of an admission that all holders of rice lands in the Konkan are entitled, as of right, to all trees growing on such lands. Having regard to the Resolution above quoted, we feel sure that no such admission was intended to be made.

The circumstance, however, that the Collector acquiesces in the decree made in the present case saves us from the necessity of considering whether the plaintiff has proved that he is entitled to the trees standing on his rice lands. The only question which remains for our determination is whether he has made out his right to the trees growing on the ' wurkas ' lands mentioned in his plaint. And it is to be remarked that the Collector does not, and apparently never has, insisted that the plaintiff should not cut any trees whatever on the lands mentioned in the plaint, or at all events on those portions of them which are entered in his name in the Survey Registers. In answer to a question by the Court, the learned Advocate General stated that he did not dispute the right of the plaintiff to cut all trees except the reserved trees, meaning, he said, thereby teak, blackwood, *ain*, and fruit trees. The cause of action stated in the plaint is a notice by the Collector to the plaintiff, dated the 2nd September 1875 (Exhibit 3) by which he was prohibited from cutting teak and other reserved trees. The issue therefore which we have to decide is simply whether the plaintiff is entitled to a decree declaring him entitled to cut upon the ' wurkas ' lands mentioned in the plaint trees of the particular descriptions which he has prohibited from cutting by the notice of the 2nd September 1875.

The grounds on which we are asked to make such a decree are stated in the third and sixth clauses of the memorandum of appeal, and are as follows :—

“ The appellant has fully established his proprietorship of

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1879 "the land and trees in dispute by the custom of the country,
VASUDAY "by prescription and uninterrupted possession, and by special
"grants and recognition made by Government from time to
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"The appellant has established his title to the land and
"trees as Mirasdar or Sufidar."

It will be convenient to consider the questions arising
out of these grounds of appeal in the following order,
viz :—

(1.) Whether the plaintiff has proved that he is the pro-
prietor of the soil in his 'wurkas' lands, and as such, pro-
prietor of everything growing thereon.

(2.) If not, whether he has acquired a right by custom
or prescription to cut down teak and other trees specially
reserved by Government, growing on such lands.

(3.) Whether he is so entitled by virtue of special
grants and recognition made by Government from from time
to time.

The two first of these issues need not occupy us long.
The plaintiff in his deposition alleged (though he did not
so state in his plaint), that he is a mirasdar, and as such
proprietor of the soil. If he were a Mirasdar, we should
probably, on the authority of Mr. Mountstuart Elphinstone
(1), hold that he was proprietor of his estate, and of all trees
growing upon it. But the terms 'Miras' and 'Mirasdar'
describe a tenure prevailing in the Deccan, and are not in
use below the Ghats. The plaintiff explains his contention
on this point by saying that he is a 'Sutidar,' and that the
'Suti' tenure in the Konkan is the same as the 'Miras'
tenure in the Deccan. In support of this contention he
points to certain entries in the Government accounts, in
which his rice land, or a portion of it, is entered as 'Suti.'
The information forthcoming as to the nature of the 'Suti'
tenure is very scanty. The Advocate General was inclined
to deny that there is any such tenure, and suggested that
'Suti' land is simply synonymous with rice land. But we
have no doubt that there is such a tenure. A former Col-
lector of Thana speaks of the 'Suti' tenure in Exhibit 246,

(1) Revenue Selections, Vol. IV., pages 159, 160,



and in *Nasarvanji vs. Narayan* (1) it is recognized as a "permanent tenure." In its remand judgment in *Atma-ram Tipnis' case* (2) a Division Bench of this Court quotes Col. Francis as saying that a Sutidar holds his land "on a permanent tenure similar in character to the dhara tenure of Southern Konkan." The witness No. 159 says "I understand the 'Suti' tenure in the Konkan to be equivalent to 'Miras' in the Deccan." But afterwards he adds "Before the survey settlement a Sutidar who abandoned his land, and ceased paying Government assessment, would not have been allowed to resume his land on his return." This, if correct, indicates an important difference between the 'Suti' and the 'Miras' tenure, for Mr. Mountsuart Elphinstone says of the Mirasdars, "They are never dispossessed, while they pay their tax; and even then they have for a long period (at least thirty years) the right of reclaiming their estate on paying the dues of Government." Of course, Mr. Elphinstone is here speaking without any reference to statutes of limitation: and I may take this opportunity of observing, with reference to the criticisms made by the learned Chief Justice at p. 93 of the *Kanara Land Assessment case* (3) on my judgment in *Narayan vs. Lakshman* (4) that I also spoke simply of the old custom of the country, relating to the right of a dispossessed Mirasdar to recover his land, and that I made no allusion to our modern laws of limitation, because they did not concern my argument in that case. If it were necessary for us to decide the question, we should have some difficulty, on the imperfect evidence before us, in coming to a conclusion as to whether a Sutidar in the Konkan has the same proprietary title in the soil of his estate as a Mirasdar in the Deccan. But we are not obliged to come to a decision on this point, because we are not concerned in this appeal with the plaintiff's title to his rice fields and it is clear on the evidence that it is only in respect of his rice fields that any suti tenure can be set up. The 'wurkas' land is never entered in the

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(1) 4 B. H. C. 125.

(2) Sp. Ap. 253 of 1872.

(3) 12 B. H. C. App. 1.

(4) 10 B. H. C. 324.



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Government accounts as 'suti,' but is carefully distinguished from it. The plaintiff's witness No. 159, already quoted, and who himself claims to be a Sutidar, and alleges his right, as such, to cut trees on this 'wurkas' land distinctly admits that "'wurkas' lands were never 'Suti' land." It may well be that the plaintiff, who has admittedly been in possession of his rice fields, by himself and through his ancestors, for more than 100 years, and who has been entered in the Government books as holding those fields, as 'Suti,' has become the proprietor of those fields, either by virtue of an original lost grant, or on the principle recognised by Manu that "cultivated land is the property of him who cut away the wood, or who cleared and tilled it." But he has wholly failed to make out such claim in regard to the 'wurkas' lands. It is possible, and for the sake of argument we may concede, that the plaintiff has had the use of the 'wurkas' land mentioned in the plaint for the same length of time during which he has held his rice lands. But it must be considered as being now settled law that all waste land belongs to the State: and 'wurkas' lands must be regarded as to all intents and purposes waste lands. The very primary object of their retention as 'wurkas' lands is that they should remain waste, as otherwise they would not supply the materials required for the manure of the rice lands, to which they are an appendage. But apart from this, it is for the plaintiff to show how the ownership these lands, which certainly were originally waste, was transferred from the Government to himself. He argues that the lands have always been marked off by distinct boundaries from the 'wurkas' of his neighbours; that the Government Officers must have been aware of these boundaries; and that they never interfered with his exclusive enjoyment of the land. He also shows that he has from time to time cultivated portions of the 'wurkas' land. But this is really no argument in favour of a recognition by Government of his proprietary title, or of the acquisition of any such title. The Government would naturally acquiesce in the use of a certain portion of the waste lands for obtaining manure, without which the rice lands could not be cultivated, or the assessment on the rice lands be paid.

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It would also readily acquiesce in the demarcation by the cultivators *inter se* of the respective portions of waste land used by them, so as to prevent quarrels and breaches of the peace. But there is nothing in this which can be construed into a grant or recognition of any proprietary title adverse to the title of the State as owner of all waste lands. Nor, granting that a right of property may by the custom of the country be acquired by continuous cultivation for several generations, or for many years, can the occasional and sporadic cultivation of patches of waste land be held to create any such title. So far from the Government having (previously to the revenue Survey) recognised any exclusive right of the plaintiff to cultivate the 'wurkas' land held by him it appears on the evidence of the plaintiff's own witness, No. 192, that when a person calling himself the plaintiff's tenant, cultivated any such land, the Government set the plaintiff aside, and levied the customary assessment direct from the tenant, who in such case paid no rent to the plaintiff; nor does it appear that previously to the survey the plaintiff ever contested the right of the Government to act in this manner. This practice is wholly inconsistent with the supposition that previously to the survey any proprietary title in the 'wurkas' lands was either recognised or asserted. It is true that subsequently to the survey the plaintiff set up a claim to a refund of assessment then being levied on his tenants for 'wurkas' cultivation; but this was not on the ground of any alleged proprietary right in the soil, but simply because, (as we shall presently see), the right of free cultivation in 'wurkas' land was, at the survey, conceded to rice-land-holders in the position of the plaintiff.

The appellant has faintly contended (though he did not specially raise the point in his memorandum of appeal) that if he fail on the ground of his being a Mirasdar or Sutidar, he can succeed in establishing his proprietary title on the ground that he is a Pandurpesha.

The term 'Pandurpesha' is defined by Mr. Williamson, formerly Collector of Thana, in a report made by him to Government in 1828 (1) as simply meaning a well dressed

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person. It may be doubted whether this etymology is correct : but Mr. Williamson was no doubt right in saying that " Pandurpesha was a term by which all classes were distinguished who held Government lands that were assessed " under the common or full rates paid by the other cultivators, and whose rank of life placed them above subsisting " by manual labour." Mr. Williamson's report contains the fullest information obtainable on what he calls the Pandurpesha tenure. The subject is also discussed by Col. Francis at page 20 of the Bombay Government Records Vol. 96 (N. S.) which is filed as Exhibit 198 in this case ; by Captain Wingate, at p. 24 of the same compilation ; and by the Bombay Government at page 69. We fail to find in these papers any suggestion that the Pandurpeshas had any greater proprietary right than other occupants. The only privilege conceded to them, in consideration of their having to maintain themselves, as well as the actual cultivator, out of the produce of the soil, was a certain remission of the Government assessment ; and we are informed by the plaintiff's pleader that they have been deprived even of this privilege since the year 1864.

For the above reasons we have come to the conclusion on the first issue which we have raised that the plaintiff has failed to prove that (independently of any grant or concession which may have been made to him since the Revenue Survey), he is the proprietor of the soil in his ' wurkas ' lands, and, as such, proprietor of everything growing thereon.

Our finding on the first issue virtually disposes of the second ; for it is clear upon authority that, if the soil be the property of another, the plaintiff cannot, either by custom or prescription, acquire an unlimited right to cut down trees growing upon that soil. I have already considered that question in the case of Vaman Janardhan Joshi *vs.* The Collector of Thana (1). Several authorities in addition to those referred to in that case have been cited at the bar (2) : and from these it results most clearly that a *profit a*

(1) 6 B. H. C. 191. (2) The Attorney General *vs.* Mathias, 27 L. J. (N. S.) 761 (Ch.) Lloyd *vs.* Jones, 27 L. J. (N. S.) C. P. 206. Race *vs.* Ward, 24 L. J. (N. S.) Cl. Bk. 153. Grimstead *vs.* Barlowe, 4 Term Rts. 717. Bailey *vs.* Stevens, 31 L. J. (N. S.) C. P. 226.



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prendre in another's soil cannot be claimed by custom, however ancient, uniform, and clear, the exercise of that custom may have been ; and that an unlimited *profit a prendre* on another's soil cannot be claimed by prescription.

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We come now to the third and most important issue in the case, viz., whether the plaintiff, is entitled by virtue of special grants and recognition made by Government from time to time.

We will first consider briefly such evidence as we have, showing the conduct of Government in respect to the preservation of valuable timber between the cession of this portion of the Konkan by the Peshwa in 1817 and the date of the introduction of the revenue Survey.

In the year 1839 the serious attention of the Government seems to have been directed to the great waste which was going on in the forests of the Konkan. In a letter of the 4th March 1839 to the Revenue Commissioner (1) the Governor in Council expressed his regret " that the prohibition " against the cutting of teak timber, which existed during " the Peshwa's time, was publicly removed on the accession " of the British Government." The plaintiff relies on this statement as evidence that at the accession of the British Government, all claims of Government of timber throughout the Konkan had been publicly abandoned. But the Governor in Council seems to have been misinformed as to the extent to which the prohibition had been removed. He must have had in his mind what is known as Dunlop's Proclamation (2)), which was issued on the 1st March 1824. It is clear on the face of this proclamation, and it has been repeatedly held in our Courts, that the abandonment by Government of its rights was intended to take effect in the Southern Konkan only ; and the proclamation itself contains a declaration that previously " it had been the practice of Government to take teak, sissao, and good timber, which may have ' been on any one's ground. " That the Governor in Council had been misinformed is further apparent from the letter of the Principal Collector of the Konkan, dated 31st October 1831, which is recorded as Exhibit 212, in which the

(1) Exhibit 214.

(2) Exhibit 270.

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Collector says, after referring to the removal (by Dunlop's proclamation) of the prohibition to cut teak in the Southern Konkan : " In Salsette, however, the prohibition has been retained, and Government still possesses a right to all teak-trees, except in villages which have been made over to proprietors. " And, accordingly, in his reply to the observations of the Governor in Council, above quoted, the Collector of Thana, in Exhibit 215, takes the opportunity to point out that there had not really been any public abandonment of the rights of Government, but merely a neglect to enforce them. " The right to restrict, " he says, " the cutting of the more valuable kinds of timber seems to have been clearly recognised and acted upon by the former Government ; and although from indifference it may have been neglected occasionally by them, and universally by us, it may undoubtedly at any time be re-established. " The Governor in Council still seems to have entertained some doubts ; but he ordered immediate precautionary measures to be taken in some of the Southern Districts which had been expressly excepted from the operation of Dunlop's proclamation, and in which, therefore, as he says " the right of Government to prevent the felling of trees seems undoubted and disputable (1). " This was in 1840 ; but the hesitation of Government seems to have been short lived : for on the 17th February 1841 we find the Collector of Thana, under directions from Government, issuing the most stringent circular order, prohibiting the cutting of teak wood without permission on any pretence whatever (2). The correspondence contained in Exhibits 217—224 shows that these orders were strictly carried out : and (as would appear from Exhibits 225, 225 D, 225 E, and 228) without any remonstrance or objection on the part of the ryots. It was apparently in 1842 that the attention of the authorities was first called to the reckless waste of timber caused by cultivation on ' war-kas ' land (3) ; and in 1846 a prohibition seems to have been issued against the cutting, not only of teak, but of eight other descriptions of trees. Then at length the cultivators came forward ; and while acquiescing in the order of Govern-

(1) Exhibit 216. (2) Exhibits 314 and 314 A.

(3) Exhibits 223 and 224.

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ment regarding teak, they represented that the extension of the prohibition to other trees growing on their sindad land would be fatal to the cultivation of their rice fields. The petitions were referred to the Collector who reported (1) that the prohibition was not really so stringent as the cultivators supposed, and that care was taken that they were supplied with wood and fuel sufficient for all necessary purposes and hereupon the Governor in Council approved of the proceedings of the Collector, and rejected the petitions (2). In 1847 the matter was taken in hand more systematically. In that year a Circular (3) was issued by the Military Board to all Collectors, Assistant Collectors, and Political Officers calling for full information regarding the forests, directing that the prohibition which had hitherto existed as to felling trees calculated to become useful timber on Government land should remain in force, but that those who chose to plant in their own grounds would have the trees recognized as their own property, "just as the trees now growing thereon are." It was however added that "none of the above rules are to be held as in any way interfering with the orders at present in force regarding teak trees." In consequence of this Circular and of a letter from Dr. Gibson, Conservator of Forests (4), a proclamation (5) was issued, and orders were addressed to the Mamlatdars (6) containing, among others, the following provisions ; that the practice of ' wurkas ' cultivation should be carefully watched and should only be permitted consistently with the preservation of timber trees ; that no teak growing in Government lands should be cut on any account, and that certain other kinds of trees should be preserved on specified spots : that the practice of taking wood for fuel from waste or ' kurun ' lands should not be interfered with—"care however being taken that trees which grow large enough to be fit for building purposes are not cut, even when they are small"; and finally that "no teak trees whether small or large, are on any account to be allowed to be cut to the bottom in any village, except those given as Inam or charitable gift to be enjoyed from generation to generation, whether permission may or may not

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- (1) Exhibit 229. (2) Exhibit 230. (3) Exhibit 231.
(4) Exhibit 233. (5) Exhibit 92. (6) Exhibit 78.

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“ have already been given, without receiving a fresh order.”
It was further directed that any one disobeying the order, against the felling of teak should be proceeded against in the Criminal Courts. Some of the provisions of the Circular were to some extent modified by a subsequent Circular issued in the same year (1). Paragraphs 8, 9, and 10 of this Circular are as follows :—

“ 8. Several Taluka Officers suggested that Warkas cultivation and Dali cultivation should be prevented, to make room for large forests, but Government does not intend that this forest law should detrimentally affect land revenue, or that it should injure the ryots. Therefore, instead of doing this, steps should be taken to see that no timber is cut down. ”

9. “ A question was raised by several Taluka Officers, upon a recent order, whether people in need of common wood capable of being used as building material, be allowed to fell it ; with regard to this, it is not meant to forbid people from using such wood for household purposes, but any one wishing to deal in timber to a great extent shall not be allowed to fell it without permission from this office. In the same manner, no permission should be given without order from this office to any one wishing to make charcoal for trading purposes. ”

10. “ Some doubts were expressed whether people should be prevented from felling common wood capable of being used as building material in places other than the portions of jungles set apart in each village on the authority of the extra order. As regards this, it is not the intention of Government to put people into difficulties in such trifling matters.

In 1849 we find permission to cut teak trees refused, though the trees had been preserved by the petitioners (2), and in another instance (3) notwithstanding that the Collector reported that “ the trees alluded to by the petitioner were planted by his ancestors on a portion of ‘rab’ (or manure) land attached to his rice fields. ” Another petitioner was more indulgently dealt with in 1850. In his case the Col-

- (1) Exhibit 83. (2) Exhibits 237 and 238;
(3) Exhibits 240, 240A and 245.



lector made the following order (1) : “ Under existing
“ rules the petitioner cannot be allowed to cut down the teak
“ trees to which he refers ; but if he enters into an agree-
“ ment with the Superintendent of Forests to preserve them,
“ he will be entitled to lop the side branches for manuring
“ his fields, and also to a third of the profits, whenever the
“ said trees may be cut down and sold by order of the Su-
“ perintendent. ” This seems to have been in consequence of
certain orders contained in Exhibit 78, which were founded on
Dr. Gibson’s letter, Exhibit 233, the object being to interest
the villagers in preserving the teak trees, by promising them
a share of the profits derived from any trees which they might
have watched and preserved.

We have now reviewed all the evidence bearing upon the
action of Government in regard to the preservation of timber
in the Thana Collectorate previously to the introduction of
the Revenue Survey. We think that the conclusions to be
drawn from this evidence are that the felling of teak trees
was universally prohibited, and that the right of Government
to do this was never questioned ; that the right to all other
trees, standing upon or to be afterwards planted upon, their
own lands was conceded to the occupants ; that ‘ wurkas ’
lands were treated not as private lands, but as Government
waste ; that the right of the cultivators to take ‘ rab ’ from
those lands for manuring their rice fields was recognized ; but
that they were prohibited from felling upon those lands trees
of certain specified descriptions, although as a favor, and not
as a right, they were permitted, to cut “ common wood ” for
domestic use, but not for trading purposes. It follows that
at the date of the Survey, no such right as the plaintiff
claims in respect to the timber growing on his ‘ wurkas ’
lands had been acquired or recognized.

We will now proceed to consider that part of the plain-
tiff’s case, (and it is on this that he principally relies),
which is put forward establishing the creation of rights by
concessions on the part of Government at and after the
introduction of the Revenue Survey.

The plaintiff’s case upon this point is that he is entitled
to the benefit of Rule X of what are called the Joint

(1) Exhibit 343.



1879 Survey Rules, and which are recorded as Exhibit 83 in
this case.

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OF THANA. That rule is as follows :—

“ Proprietors of inam, judi, and miras lands having possession of the same, have the right of cutting down
“ or otherwise disposing of all trees growing therein, and
“ also holders of Government fields, of which they have
“ been in uninterrupted occupancy from a period anterior
“ to the age of the trees, or for a period of twenty years,
“ or who have purchased the trees under the provisions of
“ Rule 2. ”

Before the plaintiff can be allowed the benefit of this Rule, he must establish two things, viz., first that the rule was introduced into the Konkan, when the Survey Settlement was made, and second, that in regard to his ‘ wurkas ’ lands, he is “ the holder of Government fields ” within the meaning of the rule.

It cannot be said that there is any *a priori* presumption that because the revenue Survey was introduced into the Konkan, the Joint Rules were necessarily introduced in their entirety. On the contrary, the presumption, if any, is rather the other way ; for we find the authors of those Rules, in submitting them to Government, making the following remarks : “ These rules comprise all the points
“ which occur to us as of sufficient importance to call for
“ notice ; but in submitting them for approval, we wish
“ it to be understood that they should be considered applicable only to the Collectorates above the Ghats,
“ already surveyed, or in course of being so. In other
“ divisions of the Presidency, where the husbandry and
“ revenue system are different, great alterations might be
“ necessary. ”

While we are discussing presumptions, we may also add there is a very strong improbability that the Government, at the time of the Survey, had any idea of abandoning its rights to valuable timber growing on ‘ wurkas ’ lands. We have already seen how jealously, for many years previous, that right had been asserted and maintained. The matter had been prominently brought under the notice of Government in 1848 by the Conservator of Forests in his letter



Exhibit 400. And in 1852 when writing to Government on the subject of the introduction of the Survey, which was then imminent, into the Konkan, the Survey Commissioner, Capt. Wingate, discussed at length the whole question of 'wurkas', and concluded by saying : ' The forest rights of Government should be reserved everywhere over the "wurkas" lands and the existing rules for the protection of "particular trees be upheld " (Exhibit 259). If then the Government suddenly abandoned its rights to which it had clung for years, it not only stultified itself, but did so deliberately and in the face of the recommendation and warnings of its most capable advisers. We should require strong evidence to make us believe this. We should certainly expect to find some resolution of Government, relinquishing its claims in distinct terms, and giving its reasons for so doing. Nothing of the kind is forthcoming ; and, as we shall presently see, the subsequent conduct of Government is quite inconsistent with the supposition that it ever intended to abandon its rights to timber growing in " wurkas " lands, or indeed that it ever gave any direct sanction to the introduction of Rule X. into the Konkan. Whether that rule was ever promulgated by one of its officers, and whether the Government is bound by such act of its subordinate, is another question ; but it appears to us perfectly certain that, if the right of Government to trees on ' wurkas ' lands was relinquished, the relinquishment was made not only without authority, but in direct opposition to the intention of the Government.

The first portion of the Thana Collectorate which was surveyed was the Khalapur Peta of the Nasrapur Taluka, and it is in this Peta that the plaintiff's lands are situated. The papers relating to the Survey are contained in Vol. 96 of the Bombay Government Records (Exhibit 198). We need not for the present refer to this compilation, because it treats only of the mode of survey and assessment, and does not deal with the question of forest or the introduction of the Joint Rules. The important Exhibit bearing upon this latter point is Exhibit 272, which is a translation of a letter from Captain Francis, the Superintendent of Survey, to the Mahalkari of Peta Khalapur. This letter is described in the

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District Judge's judgment, and has been spoken of in argument, as Captain Francis' "modifications" of the Joint Rules. The letter commences by saying that ten copies of the Joint Rules framed for the country above the Ghats had already been forwarded to the Mahalkari for guidance in respect of the management of the above mentioned Peta which had been assessed according to the Survey Settlement. Captain Francis then goes on to give certain explanations of the rules, and to state certain modifications. That with which we have now to deal is stated in para. 3, which is as follows—" Clause 10 " (i. e., Rule X.) provides that the proprietor of a field has the right to cut down trees growing in " his field. Such right must be understood to exist in this " Peta ; but this clause does not authorise the felling of " trees such as ' ain,' teak, sissav, &c., which are under the conservation of Dr. Gibson, the Conservator of Forrests ; they should be preserved as hitherto." This modification is *prima facie* fatal to the plaintiff's contention. But the plaintiff's argument is this ; that the Joint Rules were originally introduced in their entirety ; that it was not till some time afterwards that Captain Francis made his modifications, and that he never had any authority from Government for so doing ; that on the contrary it is clear from certain Government resolutions that they knew nothing about Captain Francis' modifications and would not have approved of them ; and finally, that the modifications remained inoperative, as is shown by the circumstance that an authorized translation of the Joint Rules without the modifications was supplied for use to the Revenue Officers, and was published and sold in the Thana Collectorate. The result is, the plaintiff contends, that the rules were introduced by the authority of Government, but that the modifications were made without authority. The plaintiff certainly seems to be correct as to his facts, or some of them, but we feel unable to assent to his conclusions. There is no doubt that the modifications were not sent to the Mamlatdars at the same time with the Joint Rules. There was an interval,—of not more than two or three months, the District Judge says,—but still an interval ; and if it appeared that the Joint Rules had been communicated to the plaintiff, and not the subsequent modifications, and if on the faith of the Joint Rules he had planted trees, or done any

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act affecting his interest, he might perhaps make out a claim to relief. But the plaintiff does not, nor could he, allege anything of the kind ; for he was himself a *talati* in the Nasrapur taluka, both when the Joint Rules and the modifications were circulated, and he must therefore have been well aware that the rules were to be applied with the modifications. How it came to pass that an apparently authorised translation of the rules, (without the modifications), purporting to have been introduced into the Konkan by the authority of the Governor-in-Council, was circulated among the Revenue officials, and, (if the plaintiff is to be believed), sold to the public, we are at a loss to understand. If (as appears to have been the case), this was done by Captain Francis, it was an act of carelessness ; and if (as appears probable from the Government Resolution No. 359 of the 21st January 1861, which has been put in in appeal) the Government in 1861, gave its sanction to a similar translation, the carelessness extended to the Secretariat. But here again the remark which we have already made is equally applicable. The plaintiff was not deceived by the translation ; for, as *talati* he was perfectly aware that though the translation was silent on the point, the rights of Government in teak and other trees had in fact been reserved by Captain Francis. Nor does any one appear to have been deceived by the translation, for the plaintiff's witnesses, (who are equally interested with the plaintiff in disputing the claim of Government), admit that they were well aware that, subsequently to the Survey, the prohibition against cutting teak trees on ' Wurkas ' land was enforced, and that any one who ventured to disobey the prohibition was criminally prosecuted. What orders were communicated to Captain Francis in regard to the introduction of the Survey Rules, with or without modifications, does not appear. Probably there were no orders, and he acted entirely on his own judgment. Captain (now Colonel) Francis has retired from the service, and cannot now be called as a witness ; but a deposition made by him in Atmaram Tipnis' case has been put in by consent. In this deposition he says " My introduction of the Survey Rules was confirmed by Government under Government letter No. 3370, dated 2nd September 1856." This is not strictly correct. The

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Government letter referred to will be found at page 61 of the Government Selections, recorded as Exhibit 198. In it the Government sanctioned (though not without some objections), the general system of Captain Francis' Survey, and the rates of assessment, but they said not a word about the introduction of the Survey rules either with or without modification. Col. Francis goes on to say, "The Survey "was introduced in 1854-55 in the Peta Khalapur. I do "not recollect what orders were issued. The trees except- "ed from the operation of Rule X were teak and black- "wood, which I considered to be royalties, and under the "special charge of the Conservator of Forests. There were "general rules under which I acted, viz., the Joint Report "rules, and other special orders issued by Government. "When I settled Taluka Nasrapur there were no rules in "force in regard to the Nasrapur Taluka, until after the "settlement. I surveyed and assessed under the rules in "force, and settlement rules followed. At the time that "I assessed the taluka Nasrapur I had the Joint Report "rules for my guidance, with special instructions from Cap- "tain Wingate, then Survey Commissioner. I had not "authority to alter the rules, nor had Captain Wingate. "An order of Government would have been necessary for "an alternation. I modified part of Rule X, when I applied "it to the Nasrapur Taluka. I had no special instructions "from Government to modify the rule. By 'royalty' I "mean property specially belonging to the State. I am "not aware of any law, or rule having the force of law, "making teak trees 'royalties.' I am not aware of any "law, or rule having the force of law, authorising the Con- "servator of Forests to claim any right of conservation "over trees growing on private holdings. Below and above "the Ghats, teak and blackwood only are in my opinion "royalties. It was because I considered them royalties that "I excepted them from the operation of Rule X of the Joint "Rules in the Nasrapur Taluka. I am aware that the Con- "servator of Forests conserves fourteen kinds of trees, but "not all as royalties. Besides [except?] teak and black- "wood, I consider trees growing on private holdings to be "the property of the holders. I modified the tenth rule "so as to include trees other than teak and blackwood. The



“ Deccan rules were made generally applicable to the Konkan,
“ with the exception of Rule X, which I modified. I did
“ not apply for sanction for my modification of Rule X,
“ because my modifications were in the spirit of a supple-
“ mentary rule issued by Government in 1851, printed on
“ page 142 of the Joint Report Book, edition of 1859. In con-
“ serving blackwood and teak as royalties, we followed the
“ practice of the former native Governments. No special
“ sanction of Government was obtained for the introduction
“ of the rules marked 32 A. Exhibit 32 A is a copy of the
“ Deccan rules for use in the Konkan. It bears my sig-
“ nature. I believe that I issued it for use in 1856-57 or
“ 1858. It does not contain my modification of Rule X, or
“ any reference to it. It is either contemporaneous or pos-
“ terior to the modification, of Rule X.” All this shows
pretty clearly that in his promulgation of the Joint Rules,
and of his modifications, Captain Francis acted on his own
judgment, and not under orders from Government. It does
not appear that he communicated what he had done to Gov-
ernment. We gather this from the resolution of Govern-
ment, Exhibit 81, in which it is said that Rule XI of the
Joint Rules was not in force in the Konkan, although para.
4 of Captain Francis’ modifications expressly directs that
it shall be in force. But though Captain Francis’ proceed-
ings had no direct sanction, either prospective or retrospec-
tive, yet it is clear that in reserving the rights of Govern-
ment over the better class of timber trees, he did in effect
act in accordance with the intentions of Government. It is
plain from Exhibits 81 and 258 that the understanding of
all Revenue Officers and of the Government itself has always
been that the Survey rules in regard to trees were never
made applicable to the Konkan, and that the rules in force
in that District are the rules made by Mr. Ellis, when Re-
venue Commissioner, and which form part of Exhibit 258.
This seems to have been considered so clear that Mr. Ellis,
in forwarding his rules to the Collector of Thana, com-
mences his letter by saying “it is hardly necessary to
“ premise that the rules of the Survey Joint Report in re-
“ gard to trees in the Deccan have not been applied to the
Konkan.” This seems to have been considered an axiom.

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and to have been laid down without any reference to Captain Francis' proceedings which no one ever alludes to, and of which therefore it must be concluded that the Revenue Commissioner and Government were ignorant. Captain Francis himself seems to have forgotten in 1858 what he had done in 1855 : for in Exhibit 263 we find him declaring that Rule II was not in force in the Konkan, though in his modifications (Exhibit 272) he had treated the rule as being in force. There is a good deal of confusion about the matter ; but the result of the whole evidence is that, at the time of the Survey in Thana in 1854-55, either Rule X of the Joint Rules was not legally introduced at all, or it was introduced subject to the modification made by Captain Francis in para 3 of Exhibit 272. It may be that the Government is not bound by every thing which Captain Francis did : but it certainly adopted and ratified his conduct, so far as he continued the existing prohibition against the felling of valuable timber : and this is the only part of his conduct with which in this case we have any concern. It appears to us that there is no ground whatever for the plaintiff's contention that the Government ordered the introduction of the Survey Rules in their entirety, and that Captain Francis unauthorisedly modified them. The two acts must be taken as constituting a single proceeding : and either this whole proceeding was unauthorised and invalid, in which case no portion of the rules was introduced into the Konkan and the plaintiff has no claim under the Survey rules to any trees whatever ; or else the rules were introduced with the modification, and in that case the plaintiff has no right to the particular trees, which he complains that he has been prohibited from cutting.

So far from there having been any relaxation after the Survey in the prohibitions against cutting timber on 'Wurkas' lands, we find that the vigilance of the Revenue officers was even increased. On the 1st October 1858 the Conservator of forests wrote to the Collector of Thana Exhibit 258, that he was not aware that the ryots had ever been permitted to cut down any trees on their 'rab' land, and that they ought certainly to be prevented from doing so, although he admitted

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that they had full power to cut branches, for the purpose of manure, from all trees except Teak and Sissav, and even from those trees, under certain circumstances. Thereupon the Collector, while premising that no previous prohibition had ever been issued on the subject (by which no doubt he means that there had been no prohibition in regard to the commoner kinds of timber), directed that in future the ryots should not be permitted to cut down and dispose of the trees on their 'rab' land Exhibit 250. " It appears to me, " " he writes that a ryot has merely a right to the " branches, brushwood &c., on the 'rab' land attached " to his holding, as long as he cultivates the land ap- " pertaining thereto, and that he has no right whatever to " destroy the timber growing thereon, which would even- tually cause a loss to Government." This action on the part of the Collector was approved by the Revenue Commis- sioner Exhibit 253. From the concession made by the Advocate General in this Court, viz., that the plaintiff may cut down any trees, except teak, black-wood, *ain*, and perhaps fruit trees, it would appear that the Collector of the present day is disposed to be more liberal than the Collector of 1858 but the letter referred to is valuable as showing how very little ground there is for the plaintiff's allegation that the right to cut valuable timber on ' wurkas ' land is established by recognition " made by Government from time to time."

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We have already referred to Mr. Ellis' rules made in 1862, and we need say nothing more on that subject than that those rules afford no sanction to the plaintiff's claim. We have also referred to the evidence of the plaintiff's witnesses as showing that the general prohibition against cutting teak has been systematically enforced, when necessary, by means of criminal prosecutions. Many of the records of such pro- secutions were produced and put in evidence by the witness No. 304. And the plaintiff himself virtually admits that he himself has never ventured to cut teak trees, until he felled the trees which led to the prohibition of which he com- plains.

The conclusion at which we have arrived, viz., that Rule X of the Survey Rules was not introduced into the Konkan, or was introduced with a reservation of the rights of Govern-



1879 ment in such trees as the plaintiff has been prohibited from
VASUDEV cutting, renders it unnecessary to determine, whether, if the
v. rule had been introduced in its entirety, the plaintiff would
THE COLLECTOR have been entitled to succeed ; or in other words, whether
OF THANA. the plaintiff can be said to be " a holder of Government
 fields " within the meaning of the rule. Nevertheless, as a
 great part of the argument has been directed to this point,
 and it forms one of the main grounds of the District Judge's
 decree, it is perhaps not desirable that we should pass it over
 entirely without remark.

As we have already said, the Nasrapur Taluka was the first taluka in the Konkan which was subjected to the operations of the Revenue Survey, This was in 1854-55. It appears from the correspondence contained in Exhibit 198 that the rice lands were regularly surveyed, demarcated, and assessed. But it appeared to Captain Francis that the difficulties in the way of dealing in the same manner with the ' wurkas ' lands were insuperable, or at all events that the operation would not be worth the expense. The ' wurkas ' cultivation and hill lands were therefore measured as a whole, without any definition of individual holdings. The rice lands were of course mapped, and entered in the registers in the names of the holders. The total acreage of the rice lands was then deducted from the total area of the village, and the balance was entered in the books as ' wurkas. ' No cultivators' names were entered as occupants of this land, nor did the Survey Register show that it bore any direct assessment. The plan adopted in regard to the assessment was as follows: The old plan of levying assessment from the cultivators on the actual quantity of ' wurkas ' land cultivated was abandoned, except in the case of very small holders. The larger rice land-holders, i. e., all those whose assessment exceeded Rs. 3-12-0, were subjected to a slight additional assessment on their rice lands, and in consideration thereof were allowed to cultivate ' wurkas ' lands gratis, and of course to retain their old privilege of taking ' rab ' from the ' wurkas ' lands. This plan of operations, though temporarily acquiesced in, was not approved either by the Collector, or by Government. In their Resolution No. 3370 of 1856 (1) the Government ex-

(1) Exhibit 198 , p. 61.



pressed a strong opinion that the several holdings of hill land should be demarcated and assessed : and while they sanctioned Captain Francis' system experimentally for the Nasrapur Taluka, they directed that it should not be extended to other districts of the Thana Zilla. The result was that in the other districts, the ' wurkas ' lands were demarcated, assessed and entered in the names of the several holders ; and that in 1874-75, but not before, the same system was extended to the Nasrapur Taluka.

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Now it is argued on behalf of Government that, according to the phraseology of the Survey Rules, a field is a piece of land demarcated and assessed, and the holder of a field is, as defined in Rule V, the cultivator in whose name a field is entered in the village cultivation returns. Rule XIII shows that there may be survey fields, on which no assessment is placed in the Survey Registers ; and it is not therefore necessary to consider the question, which was much discussed at the bar, whether the addition to the assessment on the rice fields, to which we have already referred as having been made in 1854-55, is or is not to be regarded as an assessment upon the ' wurkas ' lands. But it must be admitted that, upon a strict construction of the Survey Rules, a cultivator is not the holder of a field, unless such field has been demarcated and entered in his name in the Survey registers. If we had to decide the question, we think that we should be obliged to hold, that, as the plaintiff was not in this position previously to 1874-75, he could not up to that date claim the benefit of Rule X, even if it were otherwise applicable ; and subsequently to that date he could not have the benefit of it, so far as regards teak, blackwood, and sandalwood trees, because these were specially reserved by what are called the Revised Survey Rules, published in the Government Gazette of the 11th February 1869 (See Section 40 of Bombay Act I of 1865). But we are glad that we are not obliged to decide this case on the ground of a mere technical defect in the plaintiff's title, caused, not by any fault of his own, but by the omission of the Survey officers to carry out the wishes and intentions of the Government. If the cultivators in other Talukas were entitled to the timber on their ' wurkas ' lands, because those lands, had been demarcated



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and entered in their names, we can hardly think that the Government would wish to deprive the plaintiff of the same rights, merely because Captain Francis did not (as the Government thought he ought to have done, and as he was eventually ordered to do), carry out the same system in 1854-55 in the Nasrapur Taluka. The Government has in this case a complete defence on the merits: and we repeat that it is a satisfaction to us that we are able to decide the case on its merits, and not on a ground which would be extremely technical, and hardly in accordance with justice and equity.

The general conclusions at which we have arrived are these, viz., that the holders of rice fields in the Konkan, whatever may be their tenure of such fields, are not proprietors of the soil in the 'wurkas' lands held by them: and that they are not entitled either by custom, or prescription, or, (so far as appears in the present case), by any grant or recognition on the part of the Government to cut down teak or other specially reserved trees growing on 'wurkas' lands, of which they are the occupants. The plaintiff therefore cannot have a decree declaring him entitled to cut down such trees.

What trees other than teak are to be considered specially reserved is not stated in the notice to the plaintiff of the 2nd September 1875. In considering this point, the view most favourable to the plaintiff is that put forward by the Collector, viz., that the settlement of the 'wurkas' lands in the Nasrapur Taluka was made in 1874-75, and not in 1854-55. We say this, because the reservation of trees under the Revised Rules of 1869 is less extensive than that made by Captain Francis in his modifications. Adopting this view, we find that trees reserved by the revised rules of 1869 are teak, blackwood, sandalwood, and fruit trees belonging wholly or partially to Government. Sandalwood, we believe, does not grow in the Konkan. If there are any fruit-trees on the lands occupied by the plaintiff, they can only be planted by himself, and his right to these was recognized (and we think properly so) by Government in 1875 Exhibit 133. We observe that in the Bombay Land Revenue Code Bill,



lately passed by the Bombay Legislative Council, and now ¹⁸⁷⁹
awaiting the sanction of the Governor General, and which
may be taken to be the latest exposition of the views of ^{VASUDEV}
Government on the subject, the only trees, which in the ^{THE COLLECTOR}
absence of express orders are to be considered specially ^{OF THANA.}
reserved, are teak, black-wood, and sandalwood trees. More-
over, in Exhibit 302, to which we have already referred, the
Government say that they consider they are now in a posi-
tion to maintain their right to all teak and blackwood trees
in the Northern Konkan ; but the resolution is silent in
regard to all other descriptions of trees. We think there-
fore that it was, and is, the intention of Government and the
Legislature that the plaintiff should be held entitled to cut
down all tress growing upon the ' wurkas ' land entered in
his name in the Survey Registers except only teak and
blackwood trees : and to that extent we shall make a decla-
ratory decree in his favour.

It appears that a considerable portion of the ' wurkas '
lands specified in the plaint is not entered in the plaintiff's
name in the Survey Registers, and a part of it is not includ-
ed in any Survey Number but entered as forming portion
of the Village Forest. Whatever claims the plaintiff may
have to take brushwood, grass, &c. (rab) from any such
portion of the lands specified in the plaint, we cannot make
any decree declaring his title to any timber growing thereon,
inasmuch as such a declaration can only proceed on the
ground of concessions made either by legislation, or by the
rules of Government, to occupants, of Survey Numbers. We
have already stated our reasons for holding that, independ-
ently of such concessions, the plaintiff has no right to any
timber growing on ' wurkas ' lands.

We amend the District Judge's decree, and in lieu there-
of make a decree declaring that the plaintiff is by consent
of the defendant, entitled to cut down all trees of whatever
description growing upon his rice fields, and also upon the
' wurkas ' land in the following Survey Numbers, viz., No.
18 in the village or Kandroli, No, 30 in the village of Morbe,
No. 9 in the village of Koliwali and No. 98 in the village of
Nadal ; and that he is further entitled to cut down all trees,
except teak and blackwood trees, growing upon the ' wurkas '



1879 land in other Survey Numbers of which he is the occupant ;
Vasudev but that he is not entitled to cut down any trees growing
v. upon any other lands mentioned in his plaint.
The Collector The District Judge's order as to costs is confirmed. The
of Thana. plaintiff must bear the costs of this appeal.

March 25.

Before Mr. Justice West and Mr. Justice Pinhey.

ANDU BALI (defendant) v. RAMRAV BALWANT
(plaintiff) Respondent. *

Miras—Evidence of Miras holding.

There is no authority for the proposition that without a *miraspatra* or similar document giving perpetual occupation there can be no *miras* right. The *mirasdar* in ninety-nine cases out of a hundred holds no grant or written muniment of his title. It rests on possession and enjoyment under a customary law.

This is a second appeal from the decision of the District Judge of Satara, in Appeals Nos. 96 and 97 of 1878.

The District Judge has assumed as the basis of his decision that without " a *miraspatra* or similar document giving perpetual occupation " there can be no *miras* right. There is no authority for this proposition, and it is not before us maintained. The *mirasdar* in ninety-nine cases out of a hundred holds no grant or written muniment of his title. It rests on possession and enjoyment under a customary law. The questions of principle in the present case are the same as those sent down for findings by this Court in Second Appeal No. 239 of 1878 on the 9th December last. (1) We must reverse the decree of the District Court and remand the cause for retrial with reference to the principles laid down in the case we have mentioned and especially to the first, second, third, and fifth questions there proposed for decision.

When the terms of the holding as to its legal character and the rent annually payable have been ascertained, the burden of proving payment for the two years embraced within the present claim will rest on the defendant. The consequences, should he fail to prove payment, will depend on the law found to be applicable to the case according to the fifth question, or rather, group of questions, proposed in the case that we have referred to.

Costs to abide the final decision.

* Appeal No. 36 of 1879 (p. 288 of P. J. 1879):

(1) 3 Bom. 141.



Before Mr. Justice West and Mr. Justice Pinhey.
RAMKRISHNA BAILAL (plaintiff) Appellant v.
UMAJI RAMSHET (defendant) Respondent. *

1879
March 27.

Vatan, Alienation of Joshi Vatan.

Where the sale of a Joshi Vatan has been fully accepted by the plaintiff, who being the Joshi entered into an agreement after the sale of his interest to the defendant to become his deputy performing the duties for a certain portion of the emoluments, it is not open for the plaintiff to object to the sale.

This is a second appeal from the decision of the District Judge of Poona, in Appeal No. 75 of 1878.

The question on which Mr. Nanabhai has chiefly dwelt does not, we think, properly arise in this case, as it has come before us. The sale of the Joshi vatan, if it is properly called a vatan, has been fully accepted by the present plaintiff, who being the Joshi, entered into an agreement, after the sale of his interest to the defendant, to become his deputy, performing the duties for a certain portion of the emoluments. There may be a good ground according to such cases as *Khushalchand Kanji vs. Mahadevgiri (1)* and *Jagarnath Roy Chowdhry vs. Kishan Parsbad Surmah alias Raja Babu (2)*, for some one interested to come forward, and, on public grounds, require that the emoluments be reserved for the maintenance of the office and the officeholder. Nor, probably, could the Joshi's creditor, save under exceptional circumstances, acquire any right as against the Joshi's successors in office and estate, but the considerations which they might properly urge are not available to the Joshi himself, whose right has been alienated for his benefit, and who has entered into a contract with the purchaser on that footing.

On this ground, we must confirm the decree of the District Court with costs.

• Appeal No. 55 of 1879 (p. 295 of P. J. 1879.)
(1) 12 B. H. C. R. 214. (2) 7. C. W. R. 206, C. R.



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March 31.

BOMBAY HIGH COURT

Before Mr. Justice West and Mr. Justice Pinhey.
**IMAMSAHEB and INSUPSAHEB MAKHTUM-
SAHEB (defendants) Appellants v. SAYAD
HAZRATSAHEB MOHIDINPACHASAHEB
(plaintiff) Respondent ***

*Splitting cause of action—Civil Procedure Code Act VIII
of 1859 S. 7—Withdrawal of suit with leave to
bring a fresh suit—Limitation—Adverse posses-
sion—Heirs of Mahomedan.*

S. 7 of Act VIII of 1859 must be read with the section which allows the withdrawal of a suit with permission to bring another must be allowed its proper operation in placing the plaintiff in the *status quo ante*, and what s. 7 really intends is that the plaintiff should not be allowed two adjudications or the chances of two on the same cause or on a matter which ought to have been included in the same cause. When a suit is withdrawn there is no adjudication.

When the several heirs of a Mahomedan entitled to separate shares reside together and do not actually divide, it cannot be said that any one is acquiring a title by limitation or prescription against the others. The possession of each of the joint owners is the possession of all who assent to it until some one of them is distinctly excluded.

This is a second appeal from the decision of the Senior Assistant Judge, F. P. of Belgaum at Kaladgi, in Appeal No. 47 of 1877.

The suit was not barred by Section 7 of Act VIII of 1859, for, though taken quite literally, the enactment would have that effect, yet the section which allows the withdrawal of a suit with permission to bring another, must be allowed its proper operation in placing the plaintiff in the *status quo ante* and what Section 7 really intends is that the plaintiff should not be allowed two adjudications, or the chance of two, on the same cause or on a matter which ought to have been included in the same cause. When a suit is withdrawn, there is no adjudication. As to limitation, the Assistant Judge has held that as down to the time of her withdrawal from her father's house, Fatma was jointly enjoying the fruits of the inheritance, her right to a share was thus in operation and the cause of action did not arise until after her separation from her brethern. *Prima facie* where six persons, as in this case, entitled to nine shares, reside together, and do not actually divide, it cannot be said that any one is acquiring a title by limitation or prescription against the others.

•Appeal No. 57 of 1879 (P. 296 of P. J. 1879.)

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According to the doctrine of the English law, until altered by statute, the possession of each of the joint owners is the possession of all, who assent to it until some one of them is distinctly excluded. This is the principle on which the Assistant Judge has apparently relied, though his language is not quite distinct. No cases between Mahomedans as to the proper construction of Articles 12 and 13 of Act XIV of 1859 have been brought to our notice, and failing the guidance which these might afford, we cannot say that the Assistant Judge was wrong. We, therefore, confirm his decree with costs,

1879

IMAMSAHEB
v.
SAYAD
HAZRATSAHEB.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

WILLIAM LOWERBY *et al* plaintiffs v. DHANJI-SHAH NASARWANJI *et al* defendants. *

April 15.

Procedure—Reference—Civil Procedure Code, S. 617.

In a case in which a plaint has been registered, and issues framed, a reference under S. 617 of Act X of 1877 is unauthorized, because the decision in it is appealable.

This is a reference made by the First Class Subordinate Judge of Surat under Section 617 of the Civil Procedure Code.

M. MELVILL J.—In this case the plaint has been registered and an issue framed, and it was the duty of the Subordinate Judge to decide the case according to his own view of the law. An appeal would lie against his decision, and, therefore, Section 617 of Act X of 1877 does not apply. The reference in this case being unauthorized by law, this Court is unable to decide the question raised in it.

ROBERT HILL PINHEY J.—In this case the plaint has been filed and issues raised. It is not a suit in which the decree of the Subordinate Court will be final. Therefore I am of opinion that it was not competent to the Subordinate Judge to make this reference under Section 617 of the Code of Civil Procedure.

The Subordinate Judge should not have referred 3 cases with one letter.

* Civ. Ref. No. 1 of 1879 (p. 303 of P. J. 1879.)

Note—Similar judgment was given by the same Judges the same day in Gavrishankar *vs.* Narottamdas p. 304 of P. J. 1879.

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April 15:

BOMBAY HIGH COURT

Before Mr. Justice West and Mr. Justice Pinhey.

**FARDUNJI DINSHAJI et al Plaintiffs v. EDALJI
MANCHERJI and others Defendants. ***

*Procedure—Reference—Civil Procedure Code, s. 617—
Return of plaint.*

A reference to the High Court cannot be made under s. 617 of Act X. of 1877 in case in which the plaint has not been filed where the decree of the Subordinate Judge, if made, would not be final. The mere fact that an order returning a plaint under s. 57. (a) of Act X of 1877 is not appealable does not enable a Subordinate Court to make a reference.

This is a reference made by the First Class Subordinate Judge of Surat under Section 617 of the Civil Procedure Code.

M. MELVILL J.—This is not a suit in which the decree would be final, although there would be no appeal against an order returning the plaint. The reference therefore is not authorized by Section 617 of Act X of 1877. The Subordinate Judge should act according to his own view of the law, leaving the party aggrieved, if so advised, to apply to this Court for the exercise of its extraordinary jurisdiction.

ROBERT HILL PINHEY.—In this case the plaint has not been filed. But still the reference is not within the provision of Section 617, as the decree of the Subordinate Court, if made would not be final. If the Subordinate Court return the plaint on the ground that it should be presented in the District Court, he would do this by making an order under Section 57 (a). It is true that no appeal is given by Section 588 against an order under Section 57 (a): but still an order is not a decree (See definition of " decree " in Section 2), and therefore the fact of an order made under Section 57 (a) being final, does not enable the Subordinate Court to make this reference under Section 617. We can, therefore, give no decision in this case under Section 617. If the plaint is returned under Section 57 (a), the plaintiff can, if so advised, move this Court to take up the case in the exercise of its extraordinary jurisdiction.

• Civil Ref. No. 1 B of 1879 (P. 305 of P. J. 1879.)

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Before Mr. Justice Melvill and Mr. Justice Pinhey. 1879
MOJIRAM GANGARAM and 2 others (defendants 4-6) April 30.
Appellants v. VITHAL RAMCHANDRA (plaintiff)
Respondent. *

*Mortgage—Submortgagee with notice of redemption
suit—Lien on money paid under redemption decree.*

A submortgagee who advances money to mortgagees pending, and with knowledge of, a redemption suit, on the security of the property mortgaged, and whose mortgage deed contains no provision for a lien on the money to be paid under the decree in the redemption suit, and who has not by introducing himself to be made a party in the redemption suit, or otherwise, obtained an order creating a lien on such money is not entitled to a lien thereon in preference to the judgment-creditors of his mortgagors who have attached the money paid into Court under the redemption decree.

This is a second appeal from the decision of the Acting Judge of Poona, in Appeal No. 87 of 1878.

M. MELVILL.—On the facts set forth in the judgment of Mr. Justice Pinhey, the question for decision is whether, at the time of the attachment of the money paid into Court in the redemption suit, to the credit of Baburav and Amritrav, the plaintiff Vithal had a lien upon the money, by virtue of which he took precedence of the attaching-creditors. It seems to me that such a lien could have been created in one of three ways only. It might have been provided in the mortgage-deed executed by Baburav and Amritrav to the plaintiff that any money which might be decreed to Baburav and Amritrav in the redemption suit then pending should be taken by the plaintiff in payment of the amount due on his mortgage. Or, secondly, the plaintiff might have had himself introduced as a party into the redemption suit, (of which he admits that he had notice), and have obtained an insertion in the decree of an order that the amount decreed should be paid to him, as submortgagee, and not to his mortgagors, Baburav and Amritrav. Or, lastly, he might, (if he were in time), have sued his mortgagors for the amount due to him, and perhaps have attached before Judgment the money which had been paid into Court in the redemption suit. But the Plaintiff's mortgage-

* Appeal No. 99 of 1879 (p. 317 of P. J. 1879.)



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**MOJIRAM
v.
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deed contained no provision of the kind above indicated, and did not even mention the original mortgage nor the redemption suit ; and the plaintiff took no steps whatever to obtain an order creating a lien upon the money paid into Court. Under these circumstances, this money must be considered to have been, at the date of the attachment, at the free disposal of Baburav and Amritrav, and was therefore available to those of their creditors who were most vigilant in the assertion of their rights.

ROBERT HILL PINHEY.—The decree of the District Court must be reversed and that of the Subordinate Court be restored.

Plaintiff advanced to defendants Nos. 1 and 2 money on the security of a field, which belonged to Sonu, and had been mortgaged by Sonu to defendants Nos. 1 and 2. At the time plaintiff advanced his money, Sonu had filed a suit against defendants Nos. 1 and 2 for redemption of his field and this the plaintiff knew. Redemption of the field was decreed to Sonu, who at the foot of the redemption-decree paid into Court Rupees 645. Defendants Nos. 4, 5, and 6, as judgment-creditors of defendants Nos. 1 and 2, have attached this sum of Rs. 645, and plaintiff lays claim in this suit to the same sum of money under the mortgage-deed passed to him by defendants Nos. 1 and 2 during the pendency of Sonu's suit. It is clear that in the facts as above stated plaintiff has no prior right whatever to the money in Court. By the terms of his mortgage-deed plaintiff has clearly no right to it, and there is no other ground for giving him priority.

April 17.

Before Mr. Justice Melvill and Mr. Justice Kemball.

CHIMAN BABA (plaintiff) Appellant v. BHAGWAN LAKSHMAN, deceased, his sons and heirs BUDHA and GANPAT (defendants) Respondents. *

Limitation—Adverse possession—Water-course—Easement—Prescription.

The defendant constructed and used a water-course upon and through the plaintiff's land more than 12 years before the institution of the present suit to recover possession by the plaintiff. The defendant having

* Appeal No. 320 of 1878 (p. 319 of P. J. 1879.)

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been obstructed in his use of the water course obtained a decree in the possessory suit in the Mamalatdar's Court under Bom. Act V. of 1864 confirming him in possession. *Held* that the plaintiff being out of possession for more than 12 years his remedy was barred, and his title extinguished in favour of the defendant under S. 29 of the Limitation Act IX of 1871.

1879

CHIMAN
v.
BHAGWAN.

This is a second appeal from the decision of the Acting District Judge of Khandesh in Appeal No. 43 of 1877,

It appears, on the finding of the Lower Appellate Court, that the defendant constructed and used a watercourse upon and through the plaintiff's land more than 12 years before the institution of this suit in 1875. In 1874, having been obstructed in his use of the watercourse, the defendant brought a possessory suit in the Court of the Mamlatdar, who, under the provisions of Bombay Act V of 1864, decided in defendant's favour and confirmed him in possession. Whereupon the plaintiff instituted these proceedings, and the sole question before us, is, whether the Lower Courts were right in finding the claim to be barred. We think they were. Being out of possession as found by the Mamlatdar's Court, it was incumbent on the plaintiff to show that his dispossession had taken place within the period prescribed by law for the institution of such suits, and if he has failed in this particular, it is clear, under Act IX of 1871, which is the law applicable to the case, that not only is his remedy barred, but also his title is extinguished in favour of the defendant—Vide Section 29.

It is no doubt true that had the position of the parties been reversed, the present defendant could only have established his acquisition of right, in the water-course by proving a twenty years' user but, as it is, defendant's possession is in itself sufficient to constitute a title against any person failing to show a better title, and if the plaintiff has chosen to suffer his right to dispossess defendant to be barred by limitation, the effect of his long acquiescence is necessarily to extinguish his title.

We confirm the decree of the District Judge with costs.

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1879

Before Mr. Justice Melvill and Mr. Justice Kemball.

June 9.

NAHALCHAND and MOTI JETHABHAI (defendants)
Appellants v. MAGAN PITAMBAR (plaintiff)
Respondent.*

*Hindu Law—Undivided family—Powers of Manager—
Construction of eaves.*

The consent of the father and manager of an undivided Hindu family given for valuable consideration and for the common benefit of the family to the construction of eaves by the defendants' father binds the family.

This is a second appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 72 of 1877.

We are bound by the District Judge's finding that plaintiff's father consented to the construction of the eaves by defendants' father. The evidence which proves this also shows that the consent was given for valuable consideration, and that the agreement was one for the common benefit of the family. We think that such a transaction binds the other members of the family in favour of one dealing with the manager in good faith as the defendants' father appears to have done. For these reasons, we reverse the decree of the Court below and reject the claim with costs on plaintiff throughout.

April 21.

*Before Sir Michael Roberts Westropp, K., C. J. and Mr.
J. Melvill.*

THE GOVERNMENT OF BOMBAY (defendant)
Appellant v. SUNDARJI SAVARAM and
others (plaintiffs) Respondents. †

*Assessment—Jurisdiction—Udhad-bandhi Jama Bombay
Regulation XVII of 1827.*

The jurisdiction of the Civil Courts in cases governed by Bombay Regulation XVII of 1827, to deal with questions of assessment is confined to cases, where the contention is that "there is a right on the part of the occupant in limitation of the right of Government in consequence of a specific limit to assessment having been established and preserved."

Visalpur is an *Udhad-bandhi-jama* village, settled for hereditarily and in the gross at a fixed immutable rent independent of the quantity

•Appeal No. 372 of 1878 (P. 332 of P. J. 1879.)

† R. A. 50 of 1873 (P. 333 of P. J. 1879.)



of land under cultivation and payable to Government, and falls within the protection of Bombay Regulation XVII of 1827, S. 8. Visalpur is also land situated in a district ceded by the Peishwa before 1803, held by the plaintiffs and their predecessors partially exempt from payment of land revenue under a tenure recognized by the custom of the country for thirty years and upwards, and therefore falls within the claims for exemption mentioned in S. 21 of Bom. Act VII of 1863, and is liable to assessment to the extent of Rs. 28-4-4 only inasmuch as it falls within the concluding proviso in S. 25 of Bom. Act I of 1865.

This is a regular appeal from the decision of the Judge of the District of Surat, in Original Suit No. 4 of 1872.

The plaint in this suit was filed by Sundarji Savaram and twenty-seven other persons against the Government of Bombay in respect of the village of Visalpur, formerly in the pargana of Supa, but recently transferred to that of Jalalpur (1), and in the Zillah of Surat. It complains that Government, for the revenue years 1871-72, wrongfully assessed that village at Rs. 1,155-11-9, the rightful and permanently fixed assessment being only Rs. 28-4-4 (2) Government currency (which is equivalent to Rs. 29-12, Broach currency), and gave notice on the 30th January 1872 to the plaintiffs calling upon them to pay within twenty days Rs. 611-15-9, being the moiety of the above-named new assessment plus local fund cess, and that interest would be charged thereon at $\frac{1}{2}$ a pie per rupee per diem if the payment were not made within that time, and a further notice of the same date that, if the payment were not made within fifty days, the lands of the village would be transferred in the Government books from the names of the plaintiff's to those of the cultivators. The plaint, (which was, as the District Judge correctly observes, ill-drawn, and manifestly the work of some incompetent or ill-informed person), averred and prayed that it might be declared that the village is held "neither on Khatwari, nor Bhagdari, nor service tenure," the words "nor service tenure" being subsequently struck out, and the words "nor bhagdari" being abandoned in argument on behalf of the plaintiffs by their Counsel without objection on behalf of the

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(1) See Exhibits No. 38, 39.

(2) Originally the plaint said Rs. 28-4, but this was afterwards amended to Rs. 28-4-4. See Exhibit 221.



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defendants, who, as will be presently seen, maintained in their written statement that the village was Bhagdari. The plaint prayed a declaration that Government has no right to levy a greater sum by way of assessment than Rs. 28-4-4 from the village, and that the abovementioned notices of the 30th January 1872 are illegal.

The written statement of Government by way of defence, filed on the 2nd July 1872, commenced with two objections under the Stamp Act not now material. The third objection denied the jurisdiction of any Civil Court to entertain the suit inasmuch as the plaint prayed a declaration that the village is not held on service tenure. It was in consequence of this objection that the words "nor service tenure" were, by the plaintiffs, *struck out* of the plaint. On the argument before this Court, both parties, by their respective Counsel, treated this village of Visalpur, (as previously had been done in the case of the village of Kabilpur (1), as not held on service tenure, and the learned Advocate General, declining to deny the jurisdiction of the District Court to entertain the suit, abandoned the third paragraph of the written statement. It is unnecessary therefore for us to inquire whether, as formerly alleged by the Revenue Department, the Desais held Visalpur or any of their other villages on condition of service, or, if so, what would be the legal consequences of their refusal to serve. The fourth paragraph of that statement relied on the records of the Peishwa's Government, and the old records of the present Government, as showing that the village of Visalpur does not belong to the plaintiffs as proprietors, but to Government; and that the assessment is not fixed, but has from time to time varied. The fifth paragraph asserted that for these reasons Government was entitled, under the Regulation XVII of 1827, the Survey Act (Bombay Act I of 1865) and the rules framed thereunder to survey and assess the village. The sixth paragraph runs thus:—"The village in dispute is with the Desais, the plaintiffs, on a tenure similar to Bhagwari (Bhagdari), and as they did not pay the

(1) Government of Bombay *vs.* Haribhai Monbhai, 12 Bom. H. C Rep. Appx. p. 227 note (a); p. 248, note (h); & p. 265 part of note (i).



amount of revenue as per instalment " (Rs. 611-15-9) " the Government had a right to break up the said tenure and recover the amount from the cultivators themselves," and for the foregoing reasons the defendants (Government) alleged that the suit should be dismissed with costs.

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The authority of the District Court to entertain the suit being admitted, all that we shall say on the subject of jurisdiction of the Civil Courts to deal with questions of assessment is that, in accordance with the view which has ever heretofore prevailed in this presidency with respect to Regulation XVII of 1827, Chap. I, which was in force when this suit was instituted, and therefore governs it, we regard that jurisdiction as confined to cases where, as here, the contention is that "there is a right on the part of the occupant in limitation of the right of Government in consequence of a specific limit to assessment having been established and preserved." We adhere to what has been said on this subject in the Kanara Case (1) and in the Kabilpur case (2) and immediately afterwards acted upon in Shaik Gulam Mohidin bin Gulam Russool *vs.* The Collector of Ahmedabad (3). We now accordingly proceed to inquire whether there is a specific limit to the right of Government to assess the village of Visalpur. The District Judge, Baron Larpent, laid down that question thus :—Do plaintiffs prove their right to pay only Rs. 28-4-4 ? and he determined that issue in the affirmative. The present appeal has been brought against his decision.

The claim to partial exemption from land revenue in respect of the village of Visalpur in many points resembles the claim to such exemption as to the village of Kabilpur (4). At the hearing of this appeal before us, the evidence of Kesavlal Nathubhai, the Mamlatdar, taken in the Kabilpur

- (1) 12 Bom. H. C. R. Appx. pp. 1, 221, et seq. (Vyakunta Bapuji *vs.* The Government of Bombay).
- (2) *Ibid.* pp. 225, 237 to 247 (The Government of Bombay *vs.* Haribhai Monbhai.)
- (3) Reg. Appl. No. 43 of 1873, decided on the 23rd December 1875 ; Printed Judgments for 1875 p. 402 =12 Bom. H. C. R. 278 App.
- (4) 12 Bom. H. C. Rep. Appendix p. 225.



1879 **suit and there numbered as Exhibit 256, was accepted as**
THE GOVERN- **evidence in this case at the desire of Counsel on both sides(1)**
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v. The earliest document in both cases is the same ; num-
SUNDARJI. bered as Exhibit 32 in the Kabilpur case, and here as Ex-
hibit 46, dated in the Samvat year 1714, i. e., Fasli 1065 or
A. D. 1657-58. It is a private document, produced, how-
ever, and put in evidence by Government, and is an agree-
ment for the distribution of fifty-one villages in the pargana
of Supa into four shares among the Desais thereof. Visal-
pur is the forty-fourth village named therein. The argu-
ment founded on this Exhibit by the Advocate General in
favour of Government was in both cases the same. We
think that argument is disposed of by the remarks which we
have made at pp. 229, 230 of 12 Bom. H. C. Rep. in the
Kabilpur case. It would be prolix to repeat them here.
This Exhibit shows that at its date (i. e., 214 years before
the recent notice of enhancement of the assessment) Visal-
pur was in the possession of the Desais, the ancestors and
predecessors in title of the plaintiffs, and for aught that ap-
pears to the contrary, may have been in their possession and
in that of their progenitors for an indefinite time previously.

The first mention which we find of the assessment of Visal-
pur (as well as of Kabilpur) is in Exhibit 48 in this suit,
dated Samvat 1725, A. D. 1668-69 (numbered as Exhibit
No. 67 in the Kabilpur suit) Visalpur is therein assessed
at Rs. 23-4, an amount less than the rate admitted by the
plaintiffs. The main object of that document however ap-
pears as remarked in the Kabilpur case (2) to have been to
show the distribution among the Desais of, rather than the
assessment upon, the villages, the latter being to a certain
extent indicated. We do not think that this Exhibit can be
regarded as giving a complete account of the assessment on
the villages therein comprised.

We must next refer to a Dehbandi Tarija (summary of
village assessment) for the pargana of Supa, inadvertently,
no doubt, omitted from the table prepared by the Mamlat-

(1) For what was said of this evidence in the Kabilpur case, see 12
Bom. H. C. R. App. pp. 251 to 264, and 266, 267, 270.*

(2) 12 Bom. H. C. R. Appx. pp. 230, 231.



dar Kesavlal Nathubhai, by direction of Mr. Hope to show the variations in the rate of assessment for Visalpur, but which does appear in the like table for Kabilpur. That Dehbandi Tarija is Exhibit No. 98 in the Kabilpur case, and was put in by consent of both parties in the present case during the argument of the appeal. It is one of the records of Government, is dated Samvat 1748, i. e., A. D. 1691-92, and shows that the rate levied on Visalpur in that year was Rs. 29-12, which is what the plaintiffs allege to be the normal rate. That Exhibit further shows that the Rs. 29-12 comprised Rs. 3-4 as Moghlai (Mughlai). But Exhibit 66 (No. 85, Kabilpur) dated Samvat 1813, A. D. 1756-57, shows that the ordinary division of the normal revenue of Rs. 29-12 was Rs. 24-8 plus Moghlai Rs. 5-4. What Moghlai is has been explained sufficiently at page 231 of the report of the Kabilpur case (1). The plaintiff in this case, as in the Kabilpur case, rely strongly on this Exhibit 98, as showing the total assessment to have been Rs. 29-12 so early at least as A. D. 1691-92, i. e., 181 years before the date of the order of Government complained of in this suit.

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The next year of which any record has been produced is Samvat 1781 (A. D. 1724-25). The amount of total assessment on Visalpur for that year was completely abnormal, being Rs. 125+annas 14 (the annas 14 were *bhet* or present to some subordinate officer) as appears from columns 1, 2 and 3, of Exhibit 49 (numbered as Exhibit 67 in the Kabilpur case). Of Wasul Chothvo (assessment on account of Chauth), the subject of the first and third parts of note (c) to pp. 233 and 234 of the report of the Kabilpur case (2), nothing was assessed or recovered for Visalpur, though Rs. 516-4 were named in column 4 as assessed or recovered in respect of Kabilpur under that name, and nothing was assessed or recovered in respect of Ganimi for Visalpur, though Rs. 117 were assessed or recovered under that name for Kabilpur in that year. Exhibit No. 49 is a Tariji (abstract statement) of the Samvat year 1781 (A. D. 1724-25) which, as observed in the second part of note (c) abovementioned, attached to page 234 of the Kabilpur report, was a year of anarchy and

(1) 12 Bom. H. C. Rep. Appx. 231, Wilson Gloss, 345; 3 Morris S. D. A. R. 122, 165.

(2) 12 Bom. H. C. Rep. Appx. 233, 234.



1679 pillage in Guzarat, and therefore furnishes no safe guide to
THE GOVERN- the extent of the rightful or normal assessment. Not only
MENT OF BOM. were the Musalmans and Mahrathas in antagonism to each
v. other, but they, respectively, were divided amongst themselves.
SUNDARJI. Col. Wallace (" for The Gaekwar, " p. 10) speaking of the
contest between Pilaji Gaekwar and Kantaji in that year
says:—" for some time these dissensions only caused their de-
mands to fall with heavier weight on the unfortunate towns
and villages " &c. (1). The probability is that in many
villages the ordinary revenue was levied and re-levied and
levied again in such a time of rapine. Of the Re. 125-14
assessed on Visalpur, Columns 6 and 7 show that the levying
parties seem to have succeeded in collecting only Rs. 50-12 ;
and Col. 10 shows the uncollected balance Rs. 75-2. Whether
subsequently that balance was ever collected does not appear.
By Exhibit 190 for the Samvat year 1797 (A. D 1740-
41) and Exhibit 191 for the Samvat year 1798 (A. D. 1741-
42) the total annual assessment for Visalpur is stated to be
Rs. 29-12.

Five Exhibits (Nos. 50, 199, 63, 200, 201) dated respec-
tively A. D. 1749, 1750, 1752, 1753 and 1754 show a total
assessment of Rs. 24-8, to which we must add the Moghlai
(Rs. 5-4) not collected by the Government and therefore
frequently omitted from its accounts. With this addition,
the total annual revenue for these years is Rs. 29-12. Of
those Exhibits, No. 50 is styled a yadi Ganimai, that is to
say, a memorandum of the Mahrati assessment, and therefore
naturally omits the Mahomedan Moghlai, and Exhibits 199,
200 and 201 are produced from the records of the Mahrati
Government in the Poona Daftar. With Exhibit 201 (A.D.
1754) must be taken Exhibit 66 (also for A. D. 1754) which
shows both the jama Rs. 24-8 and the Moghlai Rs. 5-4, and
thus confirms our remark just made as to the necessity of
adding the Moghlai, Exhibit 201 coming from the Poona
Daftar, and Exhibit 66 being the statement of revenue de-
mand for the pargana of Supa.

Exhibit 61 (Tarij) (abstract statement) for Samvat 1811,
(A.D. 1755,) shows, in the 7th column of figures, a total as-

(1) And see Kinloch Forbes' Ras Mala, 1st Ed. Vol. I, p. 5
2nd Ed. p. 360 : I Grant Duff Hist. Mhr. 352.



assessment of Rs. 31, but the first column shows, under the head of "Revenue actually collected," only Rs. 24½ (24-8). The sixth column contains an item of Rs. 6½ for Vero, but that is not shown to have been actually levied. The meaning of the Guzarathi term "Vero" alias "Veera" or "Ve-yrāh" is given in Mr. Robertson's Glossary at page 52, pl-I, and also in Wilson's Glossary page 546. It usually means a tax upon trades or employments or articles of property. Wilson however adds that it sometimes means "a particular tax levied upon the land or upon ploughs, in addition to the standard assessment." To the Rs. 24-8, revenue levied, must be added Rs. 5-4 for Moghlai, which equals Rs. 29-12. Exhibit 67 (S. 1813, A. D. 1756-57) shows an aggregate collection (in three different sums) of Rs. 24-8. To this the Moghlai being added, we obtain Rs. 29-12.

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For A. D. 1764-65 and A. D. 1965-66 Exhibits 202 and 204, both from the Poona Daftar, show the normal assessment of Rs. 29-12.

The documents, heretofore referred to, were put in evidence on behalf of the defendants (Government).

We next in order come to a document put in evidence on behalf of the plaintiffs which, if genuine, is of great importance : it bears date A. D. 1763. The translation of it from the Guzerathi original not being satisfactory, it has been re-translated by the Translator of this Court. It is headed by a seal, the inscription on which is only partly legible and thus far is rendered by our Translator as "Devoted to the feet of the illustrious Martand." As re-translated, the document runs thus :—

" Shri (i. e., The Illustrious) Diwan of pargana Supa. To the Tarafdar Desais of the purgana Supa (named) Van (Vasi) Natha Endarji and Van Shavram Daji and all others be it known that for the village of Ma (Mavja) Visalpur (you) have always been paying the lump sum of Rs. 29½, in words, a quarter less than thirty, including Ganimai and Moghlai. Accordingly do you pay (here are two words unintelligible). Should a Jarib (survey) take place of the pargana, do you pay the same as the above mentioned rupees, a quarter less than thirty. In the in-



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"quiry which we (I) made (we found that you) had always
"been paying the same from the time of the Amal (adminis-
"tration) of the Mugal (Mogul Emperor) and the Amal
"of the Gayakawad. Therefore (we) will take (levy) as
"always. More (we) will not take. Of this matter, this is
the Kaul (assurance) of the Sarkar. Dated 22nd Ja.
"Awwal. S. (Samwat) 1820 (28th November 1763).

(What follows is in Marathi and is the last line).

" Be it known. The 22nd Moon of the month }
of Jamadil Awwal.

it is
ordered
so.

If the above Exhibit (No. 28) has been fabricated, it has not been so for the purposes of this suit. In the first place, its existence appears to have been brought to the notice of Mr. Simson, principal Collector of Surat, A. D. 1842, when he was making an inquiry into the title of the Desais. This is shown by Exhibit 86, which contains his questions to and the answers of the Dasais. The date which they assign to the document is the same as that of Exhibit 28, viz : Samvat 1820 (A. D. 1763-64). Secondly, in an Appeal No. 281 of 1856 from a lower Court to the Zillah Court of Surat, it (Exhibit 28) was filed as an Exhibit on behalf of the Collector of Surat, and bears the endorsement of Mr. A Kinloch Forbes, the Judge of that Court, on the 18th April 1857 and was returned to the Collector's pleader on the 28th April 1857 as is certified by the Sheristedar of the Surat District Court. It was filed as an Exhibit in the present suit in the Lower Court on the 20th August 1872.

The correspondence relating to its production in the District Court in 1857 was brought before this Court upon an affidavit made on behalf of defendants by Keshavlal Nathubhai Mamlatdar of the pargana of Balsar. It appears that in May 1853 Jivan Ranchorji, Police Karbhari of the village of Visalpur addressed a petition to the Mamlatdar of Supa, Dajiba Raghunath, to the effect that 12 bighas of land in that village, in the possession of Bai Kesar, widow of Naranji Khushal, had been attached in a suit by Andhiaru (Parsi Priest) Framji Rastamji a creditor of her deceased husband, and a proclamation of sale by auction to take place on the 4th June 1853 had been made. The peti-

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tion alleged that the land was part of the Jahagiri (1) lands granted for the maintenance of families, and that only the life-interest of the Jahagirdar for the time being was available for payment of his debts, and on his death devolved upon his heirs, or, in default of heirs, on the Sarkar ; and that the heir of Narain Khushal, the deceased debtor, was Bai Kesar, and that the sale would be illegal and contrary to a proclamation of the Government of Bombay therefore promulgated by the Collector of Surat. In a postscript to the petition, he stated, as was the fact, that he annexed to it a copy of a parvana relating to the village of Visalpur. That was a copy of Exhibit 28 in this suit. The Mamlatdar made, on the 25th May 1853, a report on the matter to Mr. Lestock Reid, the First Assistant Collector, mentioning the suit, attachment and proclamation for sale and forwarding the letter. The following passage in his report is, in respect of a point of importance, to be touched on hereafter. It is this : " As this village is of the Bandhi Jama, the Bhagdars annually pay Rs. 28-4-4 of the Company's coin to Government on account of Government Fulseri [Phalseri]. The phrases Bandhi-Jama and Bhagdars do not occur in the petition of Jivan Ranchorji. So the Mamlatdar did not obtain those phrases thence. [It does occur in his (Jivan's) second petition dated 27th May 1853]. The Mamlatdar further mentioned that Jivan Ranchorji, the petitioner, was brother-in-law of the widow Bai Kesar, that he alleged that the village was obtained from the late Government for the purpose of maintaining the family hereditarily, and therefore that it would be contrary to the Government Proclamation of the 20th September 1848 to sell any portion of the village. He observed that the parvana of which the copy was furnished by Jivan Ranchorji, did not contain any such condition against sale as the Government Proclamation. A memorandum, addressed apparently by Mr. Reid to the Collector, observed that there

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(1) As to the lax use of the terms " Jahagir " and " Saranjam see 12 Bom. H. C. Rep. Appendix p. 248. The phrase " Jahagiri " in the petition and whenever used in relation to the plaintiff's claim in this and the Kabilpur case is misapplied. See further to Jagirs 4 Bom. H. C. Rep. 9 A. C. J.



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is a great doubt whether *Bandhi-Jama* can be attached and sold or not." He also suggested that the land being subject to a Phalseri hak and falling within Clause 2, Section 6, Regulation XVII of 1827 could not be sold without the sanction Government, and that a certificate should be given under Clause I, Section 67 of Regulation IV of 1827 to stop the sale. Eventually, the Collector (Mr. Liddell) directed the Sarkari Vakil (Government Pleader) to inquire into and report upon the matter. He advised a civil suit to remove the attachment. That suit was brought in the Court of the Principal Sadr Amin in the name of the Collector as plaintiff against the attaching creditors as defendants, and resulted in a decree for the plaintiff that the attachment should be removed. The defendants appealed to the Zillah Court. With regard to that appeal there was a correspondence between the Government Pleader and the Collector (annexed to Keshavlal Nathubhai's affidavit above mentioned) pointing out an error in the plaint in the civil suit with the reference to the payment by Bai Kesar of the assessment on her land separately, and that the defendants had taken advantage of that error to induce the Court to believe that the Bhagdars held their lands separately and that the Court demanded further evidence and an explanation of the term " Fulseri (Phalseri) hak, " and also as to how the village is described in the Government Daftar, whether the village is of the *Bandhi-Jama* or of what sort. It should be noted that although in the correspondence relating to the Civil Suit of 1853 and the appeal in it in 1857, and in that appeal itself, some question was made as to the meaning of the Fulseri (Phulseri), none was made as to the term *Bandhi-Jama* which seems to have been regarded as a recognised and familiar denomination of land paying an invariable assessment. The then Collector (Mr. George Inverarity) gave the necessary directions for the procurement of skilled witnesses such as Mazmudars (1) and Bhagdars, and of documentary evidence, and directed the Government Pleader to report the result. This he did on the 25th March 1859. He mentioned the examination of wit-

(1) Vide Wilson's Gloss. 321 and " Muzmudar " I Grant Duff Hist. Mahr. 12, Bombay reprint of 1863.

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nesses sent by the Mamlatdar, and that "it is established
"that the village is of the Bandhi-Jama, and the Sarkar
"has never divided the land among the Hissedars and that
"the village is decribed in the Sarkari Daftar as of Bandhi-
"Jama." The Government Pleader continued : "The
"Mazmudar has produced the books of the jama-bandhi
"(revenue collections) from 1908 to 1912 inclusive, and
"from them it is proved that this village is described
"in the Records of the Sarkar as one of Bandhi-Jama."
Speaking of another village he said "Mavji Athwa Bhuta's
is a village of the Bandhi-Jama." The late Judge Mr.
Sutherland refused to give an order to attach and sell
its land. An extract from the report-book of 1836
should be put in in this case. He further mentioned
in a subsequent letter to the Collector of the 7th
April 1857 that the Judge had called for the original parva-
na (Exhibit 28 in the present case), of which a copy only
had up to that time been put in evidence in the Collector's
suit to set aside the attachment. The circumstances relating
to the obtaining of the original, are mentioned in a memo-
randum of the Mamlatdar of Supa of the 14th April 1857,
viz., that the parvana was in the possession of Sundarji Sav-
ram who declined to give it up unless a copy of it were made
and deposited with him, and that he would return the copy
on the restoration of the original. The copy was made and
given to him accordingly. The original parvana was return-
ed to the Mamlatdar by the Government Pleader on the 28th
April 1857, as appears by the memo made by the latter of
that date and the receipt given by the former of the 29th
April 1857. The judgment of the Appeal Court was given
on the 18th April 1857, a copy of it is in evidence in this
cause. After stating the nature of the suit, and the remand
to the Sadar Amin the judgment proceeds thus : " On re-
" trial, the Sadar Amin held that land of the description of
" that sued for was not saleable. Hormasji &ca. (defend-
" ants in that suit) appeal on the ground that the land is
" saleable. The question before the Court is whether the
" case is one to which Reg. XVII of 1827, S. 6, Cl. 2 appli-
" es or not ; and the opinion of the Court is that that Regu-
" lation does apply. The land in question is in the village of

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“ Visalpur, which is in the hands of a family called the Ka-
“ liawari Desais, and is situated in the Supa pargana of the
“ Surat Zillah. The Collector in his plaint calls the land
“ ‘ bandhi-zumin,’ and states that there is a ‘ Phoolsuree ’ of
“ Rs. 28-4-4 per annum leviable upon the sharers, and that
“ Bai Kesar’s share is Rs. 1-12-3. In a supplemental peti-
“ tion he contends that, under the above quoted Regulation,
“ the land is inalienable without his sanction. Hormusji
“ contends that the village is Inami, and saleable. No sa-
“ tisfactory explanation of the term ‘ Phoolsuree ’ could be
“ obtained from the witnesses ; but one of the Kaliawari
“ Desais, who was examined before the Appeal Court stated
“ that his family held a parvana from the Peishwa’s Govern-
“ ment, and this original document has been laid before the
“ Court. The Parvana states that the Kaliawari Desai fa-
“ mily have been in the habit of paying as Ganimai (the Ma-
“ ratha levy) including Moghulai [the old Mahomedan levy
“ in the gross [oodhur], the sum of Rs. 29½ on the village
“ of Visalpur, ‘ Oodhur Veera,’ is explained in the Reve-
“ nue vocabulary to mean ‘ sums levied ’ in the gross on cer-
“ tain trades and occupations or on certain castes.’ The
“ levy is now termed a ‘ Phoolsuree.’ It is immaterial to
“ inquire as to the exact designation of the levy, because so
“ much at least appears indisputable, that it is a levy made
“ in the gross [Oodhur], or at least originally so made, that
“ on condition of the payment of the levy, the lands of Vi-
“ salpur are held exempt from the payment of any other re-
“ venue to Government, and that the produce of these lands
“ is evidently the means of the payment of the levy. Hor-
“ musji does not show that the levy has been laid as a fixed
“ assessment upon any portion [i. e., any particular portion]
“ of the lands of Visalpur, the remaining portion having
“ been thereby absolved from all restriction on account of
“ the levy. It appears to the Court therefore that the Re-
“ gulation already quoted does apply : that Bai Kesar could
“ not alienate her land in Visalpur without the Collector’s
“ sanction, and that Hormusji, who possesses no right except
“ what he derives from Bai Kesar, and therefore none in ex-
“ cess of hers, is also incapable of alienating the land with-
“ out the Collector’s sanction. The decree of the Lower

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“ Court is affirmed with costs.” The Judge, no doubt, was of opinion that the words “ exempt from the payment of “ revenue ” in Cl. 2 of Sec. VI. Regulation XVII of 1827 include partial exemption. See preamble and Secs. II, XXXV, XXXVI, XXXVII, XL et seq. of that Regulation.

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Points III, IV, X, and XI in the present defendant's memorandum of appeal are specially aimed against Exhibit 28, and it has been further objected by the learned Advocate General, with reference to Sections 16 and 20 and the Schedule of Bombay Act VII of 1863, which has been substituted for Regulation XVII of 1827, Secs. 39, 42 and App. C. [repeated by Sec. I of Bombay Act VII of 1863], that it has not been proved that either of the seals to Exhibit 28 is the Mutaliki seal, or that the Diwan was at liberty to use it. The term ‘ Diwan ’ however is an *alias* for that of ‘ Mutalik, ’ I Grant Duff Hist. Mahr. p. 173, Bombay reprint of 1863, III Id. 376 Index—and he was a Minister of high position with regard to the Revenue and entitled to use the State seal [1]. It should be noted that Clause 2 of Sec. 39 of the repealed Chap. IX of Reg. XVII of 1827 has not been re-enacted in Bombay Act VII of 1863, and that Section 20 of that Act is more favourable in its terms to the holders of sanads, or other such writings as there described than Sec. 39 of Reg. XVII of 1827. With regard to Section 16 of Bombay Act VII of 1863, it should be observed that Exhibit 28 does not purport to be a sanad or original grant, but merely a parvana of recognition of that which had already been long previously in existence ; and further, even if we did regard it as a sanad, that section does not peremptorily exclude it from evidence, but merely provides that the trying authority “ shall not be bound ” to admit it as such unless registered. It is discretionary with the trying authority to admit it or not as that authority may deem fit. The previous recognition of it by a Collector of Surat (Mr. Liddell) and the District Judge, many years ago, are strong reasons for exercising that discretion in favour of admission. It was further remarked that this Exhibit presented the anomaly of a Mussalman month associated with a Hindu year in its date. This, however, where the Mahomedan authority and Mahrata

[1] Wilson Gloss, 144, 145, 359.



authority were so much mixed up as in Guzerat and especially in Surat and its vicinity, is no matter of surprise. To some of the documents in this case there are both Mahomedan and Hindu dates. The objection that it was sealed only and not signed, is of no weight. Such was frequently the case with the most valid documents. The original has been produced and filed in this suit. Baron Larpent, the District Judge, who heard this suit in the first instance, mentions that "the authority of the official named" (the Diwan) "has not been questioned, neither has the genuineness of the seals, but the date is so remote that evidence probably was not obtainable." It is alleged in the memo. of appeal that Exhibit 28 was not produced to Mr. Morrison or Mr. Newport at the periods when they respectively called for documents of title and commenced inquiries which either never were completed, or, if completed, never were attended with any result. There certainly does not appear to be any evidence that it was produced to either of those gentlemen and, so far as it goes, that circumstance is unfavorable to the plaintiffs. But looking at the evidence on the subject, we are not in a position to say *positively*, whether it was produced to either of them, or not, or whether or not, they may have been informed of its existence in the same manner as Mr. Simson appears to have been made aware of it. And if it were not produced to them at the preliminary stages of their inquiries, it does not thence necessarily follow that it was not in existence, or would not have been produced before them in the later stages of the inquiries, those inquiries were, as argued for the defendants, unfinished. It purports to have been executed A. D. 1763 (S. 1820), i. e., 108 years before the order of Government of which the plaintiffs complain, and its venerable appearance is in harmony with its date. It is true that it was Jivan Ranchorji one of the Desais, who suggested to the Collector of Surat the propriety of stopping the sale of Bai Kesar's small holding in the village of Visalpur under the attachment. But the Collector did not leave the conduct of the suit to him, and instructed the Government Pleader to inquire into the matter, which he did, and the Mamlatdar sought the necessary witnesses and papers, and



obtained Exhibit 28 from the Desai, who then held it and was chary as to how he parted with it. Mr. Kinloch Forbes evidently was very cautious in disposing of the suit, and not satisfied to accept a copy in lieu of the original, although produced on behalf of a Collector plaintiff. The parvana could not have been submitted to any person more profoundly skilled in the antiquities of Guzerat than Mr. Kinloch Forbes, learned author as he was of the Ras Mala of that province, where he spent fifteen years in various important offices, judicial, political, and financial, during all of which time, he was a most diligent student of the history and antiquities of Guezrat, Kattiavar, and the Mahi Kanta. It is a circumstance, therefore, of great weight, in the plaintiff's case, that Mr. Forbes should have deemed the parvana genuine. Looking then to the apparent antiquity of that document, to its coming from the proper custody, to its having successfully passed the ordial of Mr. Forbe's criticism in 1857, to its having then been put forward by the Collector in his suit as genuine, and to the vehement probability that it was the document named to Mr. Simson by the Desais in 1842, we thought, at the hearing of this appeal from the decree of Baron Larpent, made in favour of the plaintiffs, that the burden of impeaching Exhibit 28 lay upon the defendants, consistent as that document appears to be with far the major part of the other evidence in this case. We then informed the late Government Pleader, Mr. Dhirajlal Mathuradas, that, if he could produce evidence to show that neither of the seals on Exhibit 28 was the Mutaliki seal, or that the Diwan, by whom that Exhibit purported to be granted, had not authority to make such a grant, or to use the Mutalki seal, we would receive such evidence. We gave him time for the purpose of obtaining it. We asked him once or twice since whether he had been successful in discovering any person who possessed the necessary knowledge to speak as to the Mutaliki seal, but he replied in the negative. His learned successor in office has informed us that he has not, since the death of Mr. Dhirajlal Mathuradas, received any instructions as to the possibility of producing any such expert, or any evidence on the matter ; we must therefore conclude

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They rely on Exhibit 205, a taleband, dated A. D. 1767-68 and produced by them from the Poona Daftar, as inconsistent with it, inasmuch as that taleband purports to show that Rs. 87 were both assessed upon and levied from Bisalpur (Visalpur) in that year. There is some difficulty however in reconciling that taleband with Exhibit 206, a tarij, also put in evidence by the defendants, and which is said to come from the same quarter. It is for A. D. 1768-69. It charges Visalpur with Rs. 29-12 only for that year, but while showing that the assessment for the preceding year was Rs. 87, and was, therefore, for that year an increase of Rs. 57-4, its fourth column headed " balance last year " contains opposite Visalpur the figures 29-12. If the taleband (205) were right, there was not any balance for A. D. 1767-68, as it treats the whole sum assessed, Rs. 87, as collected in that year. It has been argued for the defendants that " balance last year " is a mistake for " assessment of previous year, " i. e., for the year previous to A. D. 1767-68 and that the object of the 4th column is to compare the assessment for A. D. 1766-67 with that for A. D. 1767-68. That, however, is a somewhat violent change of the language of the heading of column 4 of Exhibit 206, and when we examine the entires in that column opposite to the names of some of the villages other than Visalpur, they would seem not to bear out that theory ; for instance, opposite Sisodra, the figures are 901 in that column, which sum nowhere appears to have been the assessment of that village for A. D. 1766-67, or in any other year. Exhibit 205 showed as to Sisodra an uncollected balance of Rs. 48-4 in A. D. 1767-68. Opposite to Kasba Supa, we find in the 4th column of Exhibit 206 Rs. 500, but that has not anywhere been shown to be the assessment on that village, which both in 1767-68 and 1768-69 appears to have been assessed at Rs. 2, 500. Similar remarks may be made with respect to several other villages named in Exhibit 206 and also in



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Exhibit 205. But, even, if the explanation offered by the defendants of column 4 in Exhibit 206 be correct, and that Rs. 87 were actually levied in Visalpur in A. D. 1767-68, we are inclined to think that something in the nature of a raid must have occurred there in that year, and that such a levy was, like that of Rs. 125 in A. D. 1725, quite anomalous.

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We should remark here with respect to the parvana (Exhibit 28), that even if it were out of the case, our impression is that the weight of evidence is in favour of the plaintiffs.

Exhibit 206 just mentioned shows that the assessment for A. D. 1768 was at the normal rate Rs. 29-12.

Exhibit 208 [A. D. 1770] specifies in its first column Rs. 61 as the gross assessment on Visalpur, divided, however, by columns 1 and 2 into two sums, whereof one is Rs. 30 for principal revenue, and the other is for Rs. 31 additional revenue. This latter sum is by the last column but two headed " Khasgi, " i. e., private [or secret as our Translator calls it] Professor Wilson (1) renders the Marathi word " Khasgi " thus : " One's own private or personal property in contradistinction to the revenues or concerns of the State ; own, personal, peculiar. " Exhibit 208 does not show the amount of revenue collected for A. D. 1770. Exhibit 192 for S. 1827 [i. e., A. D. 1770-71] names Rs. 29-12 as the assessment for that year, And Exhibit 54 (2) which gives the assessment for the seven years extending from A. D. 1770-71 to A. D. 1776-77 inclusive, states it as Rs. 29-12 except in 1772-73, when it is set down as Rs. 29. It is deserving of remark that during these seven years the assessment on the villages named in Exhibit 54 other than Visalpur (excepting Jamalpur, Virvadi and Kabilpur) varies considerably. A similar remark may indeed be made with reference to the accounts generally.

Various other exhibits, not quite in continuous order show that the assessment on Visalpur from A. D. 1777 down to A. D. 1795 was Rs. 29-12, except in A. D. 1778 [Exhibit 213] and A. D. 1785 (Exhibit 53), when it was Rs. 30-12;

(1) Glossary p. 281.

(2) See also Exhibits 210, 211, 212, 193, 47.

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1879 but Exhibit 53 shows that the extra rupee in A. D. 1785
THE GOVERN- was for a Diwali present (bhet) and the same explanation
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consists of certain extracts from a day-book, kept A. D.
1799-1800, showing small payments made at various times
in that year, and amounting to Rs. 28-4 in the aggregate. It
does not thence follow that there was any variation in the
assessment, although only Rs. 28-4 may have been entered as
actually paid.

The heaviest levy made on Visalpur, of which there is any
evidence in the case, was in the Samvat year 1858 (A. D.
1801-2). Exhibit 73, after recording that the normal rate
Rs. 29-12 was first levied in the payments there stated, pro-
ceeds thus : " It having been decided to take an increased
amount from this village, [the following amount] was col-
lected on that account "—and then shows that Rs. 240 were
collected on the 29th of the month of Ramjan [Ramazan]
[corresponding with] Posh, and Rs. 210 were collected in
three items in the month of Saval [corresponding with]
Maha, i. e., Rs. 450 beyond the usual levy of Rs. 29-12 mak-
ing a total of Rs. 479-12. The Desais were asked by Mr.
Simson in 1842 to explain this abnormal impost, and did so
as follows : " In Samvat 1858 [A. D. 1801-2] Rajaram
Bhan came to our village. During his time, we were great-
ly oppressed, and our houses also were knocked down. We
therefore ran away. At that time he must have exacted
such sums from the rayats as he liked. " See Exhibit 86
and Exhibit 87. This explanation seems highly probable
when we recollect that the dominion of the Peshwa in Guze-
rat was then on the eve of expiration. So shortly after that
levy as the 31st December, 1802, he signed the treaty of
Bassein whereby he ceded to the British, amongst several
parganas, that of Supa and other territories. Any reader of
Grant Duff's History [1], Forbes' Ras Mala [2], and Wal-
lace's " Gaikwar " [3], will remember that Guzerat was

- (1) Vol. III, Chap. XI, XII. (2) Bk. III, Chap. II, III.
(3) Chap. V. VI.



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during 1802 in a state of convulsion, both the Gaikwar's portion of that province and the territories at large of the Peshwa being the scene of warfare, pressed as he then was by Holkar and Amritrav. It is not any matter of surprise that his subordinates seized the opportunity to oppress his subjects in Guzerat just as they were passing from his sway.

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For the Samvat year 1859 [A.D. 1802-3] a Tarija is produced which shows, in its 1st column of figures, 29-12 as the principal assessment of Visalpur, which is also shown in the third column as the " total amount of assessment and cesses." The 5th column headed " total of haks, customs, and taxes (Veera), " however, has Rs. 50 opposite to Visalpur which in column 6 is totalled with the Rs. 29-12 as Rs. 79-12 ; of which sum the seventh column and exhibit 106 show that only Rs. 25-2 were levied. The 8th column exhibits a balance of Rs. 54-10 which is not shown to have ever been paid. Exhibit 107 [S. 1860, A. D. 1803-4] and Exhibit 108 [S. 1861 A. D. 1804-5] prove payments of land-revenue in respect of Visalpur of Rs. 29-12 only in each of those years. Exhibit 109 (S. 1862, A. D. 1805-6) proves a payment amounting to Rs. 28-12 only for Visalpur in that year, and Exhibit 110 (S. 1864, A. D. 1807-8) shows payments amounting to Rs. 22-12 only in that year for Visalpur, but both of those Exhibits being merely extracts from the day-books do not state the amount of assessment imposed. Exhibit III (S. 1865, A. D. 1808-9) a similar document, shows payments of Rupees 27 only for Visalpur.

Various Exhibits show that from A. D. 1809-10 to A. D. 1812-13 the land revenue for Visalpur was the normal rate Rs. 29-12.

Exhibit 118 (S. 1871, A. D. 1814-15) shows for that year a total of Rs. 30, at which rate several Exhibits prove that it continued down to A. D. 1830. The extra 4 annas, which being the previous ordinary rate (Rs. 29-12) up to Rs. 30, are accounted for by four annas being deducted from the annual land revenue payable in respect of Kabilpur and being added to the annual charge for Visalpur [1]. The rate con-

(1) This is proved by the deposition of Gopaldas Keshavdas made before Mr. Simson in his inquiry in 1842. See Exhibit 87.

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In 1870 the village was newly surveyed and assessed at Rs. 1087-12, of which sum Rs. 28-4-4 only was recovered, and the balance Rs. 1059-7-8 remitted. The order made by Government in 1871-72 to pay the full amount of the new survey rate of assessment *plus* local fund cess, was the cause of the present action.

In the case of this village of Visalpur, the Government revenue accounts from A. D. 1848-49 to A. D. 1868-69 present the same strong feature which distinguished those in the case of Kabilpur, and is mentioned at page 263 of the report of the judgment in that case (2). This new form of accounts was introduced in 1848-49 by order of Mr. Shaw, then Revenue Commissioner, as stated by Kesavlal Nathubhai, the Mamlatdar, a witness in the Kabilpur case on behalf of Government. There was not any attempt on the part of the Advocate General and his learned associates in this case, to contend that the plaintiffs had taken any fraudulent means to cause the adoption of that form as was argued by the pleader for Government in the District Court, but as Baron Larpent correctly said, that was "mere assertion,"

(1) See Exhibit 196 containing the Desai's petition dated 24th January 1823, and Mr. Lumsden's order (dated 14th February 1824) removing the Talati. See also Exhibit 40. And as to Talatis see Reg. II of 1814, Reg. XVI of 1827, Sec. 24, Reg. XVII of 1827, SS. 21 to 27.

(2) 12 Bom. H. C. Rep. Appx. p. 263.



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and we have not been shown any evidence to support such a surmise. It was simply said here for Government that the Government officials had fallen into error in their mode of book-keeping for certain villages, including Visalpur, in the pargana of Supa. Of this supposed error, it cannot be said that there is any direct evidence. The main effort of the Counsel for Government was to establish the mistake by inferences suggested, it is said, by the fact that in many of the earlier Exhibits, the villages of Toli, Vigam, Wagad, and Nasirpur are specially mentioned as inami or vazifa, whereas, although Visalpur, Kabilpur, and many others are also named in those Exhibits they are not treated as Inami or Vazifa, and, on the principle *Exceptio unius &c.*, must be regarded as Khalsa, or rather as liable to such variation of assessment as may please Government. But the form, in which the plaintiffs' case has been substantially put before us, is not that Visalpur is Vazifa or an ordinary inam, but, that it is a village held on Bhagdari tenure, and that the Bhagdars (i. e., the share-holders) settle hereditarily and by right for the revenue "in the gross;" and thus to adopt the language of Section 8 of Regulation XVII of 1827, possess "in some measure a proprietary right in the land of their village," and, therefore, are entitled, under that section, to have the "peculiarities" of their tenure respected and preserved, "whether they relate to the occupancy, disposal, and assessment of the lands of the village, the collection of the revenue, and the joint liability of the share-holders or" &c.; and to this they add that one of the peculiarities of their tenure of this particular village to be respected and preserved is that its assessment is fixed and cannot lawfully be exceeded. Such fixity of assessment, it is contended, though admittedly not an indispensable ingredient in Bhagdari tenure, must, in virtue of the provisions of Sec. 8 of Reg. XVII of 1827, when found to exist, be upheld (1),

That Visalpur is held on Bhagdari tenure (2), and that

(1) Vide Note (i.) 12 B. H. C. R. Appx. 252.

(2) As to this tenure it is unnecessary to repeat here what we have already said in our Note (i) commencing at page 252 and ending at page 267 of the report of the judgment in the Kabilpur case, 12

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the Desais who hold it pay the assessment in the lump and are jointly responsible for it to Government, has not, in the argument, been denied. The defendants have, in their written statement, as already mentioned, alleged it to be bhagdari, and even their witness Kesavlal Jivanlal, the ex-Talati, whose evidence, when he was examined by Mr. Mulock in 1869, is at least as to the attitude of the Desais with reference to the Talati-ship, manifestly untrue, admits that Visalpur was held in Bhagwari (i. e., Bhagdari) tenure. In the plaint filed by Mr. Liddle, the Collector, in the suit instituted as already mentioned in 1853, he speaks of the holders of the village as " Bhagdars " (1) ; so did Rajabhai Chimanlal, the Mazmudar of Supa, called as a witness on behalf of the Collector in the same suit in 1857 before the District Judge, and that the village is assessed by Government in one sum (i.e., in the lump), and that the villagers arrange amongst themselves as to the payment (2). These are the true characteristics of the Bhagdari or Narvadari tenure, and we have already noticed that Mr. Kinloch Forbes then held it to be " indisputable " that the revenue assessed upon Visalpur was fixed and payable in the gross, and that Visalpur was exempt from liability to pay any other revenue.

The real contest in the present case, as in that of Kabilpur, was as to the fixity of the assessment. There was a good deal said on behalf of the defendants to the effect that " Bandhijama " and " udhad bandhijama " are comparatively novel expressions, and have not been heard of until after the first quarter of this century. Whether these remarks are well founded is more than doubtful, but even if those terms be novel, those peculiarities of tenure which they are respectively intended to denote, viz., immutable assessment levied in the ordinary way and immutable assessment leviable in the lump, are by no means novel. It may be that fixity of assessment has long ceased to be

12 Bom. H. C. R. Appx. To what we have said there as to it and as to udhad-bandhijama villages we fully adhere. *Vide etiam* 12. Bom. H. C. R. p. 43, Appx.

(1) Exhibit 224. (2) Exhibit 37. See also Exhibit 39.



general throughout Western India (1) ; but it would be difficult to name any time when it did not exist in certain places, and when it has not been recognized to a certain extent. All of our legislation relating to partial exemption (2) from land revenue bears incontrovertible testimony to the existence and recognition on fixity of assessment to a certain extent. There is however no scarcity of testimony to the fact that *bandhijama* and *udhad bandhijama* are terms well understood in the country whence this case comes. We adhere to, without repeating, the observations which we have made as to those terms in pp. 258 to 269 in the Kabilpur judgment (3), and in the note to those pages.

The term "Bandhijama" is applied by one of plaintiffs to Visalpur in his evidence (Exhibit 27), by Maniram Umidram in his evidence (Exhibit 41), by Maniklal Chimanlal, a witness for the defendants (Exhibit 42), by Collector Liddle in his plaint in 1853 (Exhibit 224) by the Desais (Exhibit 80), by Mr. Simson, Collector of Surat, (Exhibit 87), in his questions put in 1842 to Gopaldas Keshavdas, the Mazmudar of Kaliawari, who called Visalpur a Khatabandhi village, but said that it paid a "fixed assessment" (Mukrari ankdo) and eventually was bullied by his interrogator so much as to the item of assessment Rs. 479-12-0 for Samvat 1858 (A. D. 1801-2), which we have already discussed and disposed of, that, like a true oriental and loyal subordinate revenue officer, he assented to every thing which the Saheb was pleased to assert. Mr. Simson's questions show perfectly well that by "bandhijama" he meant "fixed assessment.", The term "bandhijama" is used by the informer Kashinath Govindji in his petition of the 25th June 1850 to the Revenue Commissioner (Exhibit 88) as to Jamulpur. One of his motives for giving information (true or false as it may be) as to that village is expressed in the petition, namely, that he might obtain a reward out of the revenue of the village. The term "bandhijama" is applied to Vi-

(1) Vide 12. B. H. C. R. App. pp. 48, 50, 71. and the references there ; also 4. Rev. Sel. pp. 479, 481, 651, 179.

(2) Reg. I of 1823, Reg. XVII of 1827 Chapters IX and X. Bom. Acts II and VII of 1863.

(3) 12 B. H. C. R. Appx. 258 to 269.

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salpur by Rajabhai Chimanlal, the Mazmudar of Supa, when giving evidence (Exhibit 37) on behalf of the Collector of Surat in March 1857 in the appeal to Mr. Kinloch Forbes, as District Judge. There does not appear to be any reason for doubting the *bona fides* of that witness, and Mr Forbes acted on his testimony. In Exhibits 164, 171 and 174, which are extracts from the Government ledgers for the Samvat years 1913 (A.D. 1856-57), 1920 (A.D. 1863-54), and 1923 (A.D. 1866-67) the assessment of Rs. 28-4-4 is, on the debit side, expressly described as "Bandhijama." And the witness Nichabhai Ratanji in his deposition (Exhibit 38) in this suit, swears that Visalpur paid "a fixed assessment." In the report of Mr. Pedder and his fellow Commissioners of the 6th October 1865, para 47 (1), we find the fact that Visalpur and four other villages in the Supa pargana pay "a fixed annual lump assessment," and in para 48 those gentlemen refer to a passage in a letter of Mr. Morrison in 1820, in which he says : "Some Desais hold entire villages paying only a fixed salami (2) annually to Government, but there are only six small villages of this description under Surat." Of this passage Mr. Pedder and the other Commissioners say "The five Supa villages and Chikli Kusba are the only ones which can be referred to, and from this it would seem, that Mr. Morrison considered them to be Wuttun (Vatan)." In para 49 they continue : " We are of opinion that all six villages should "be included among Wuttun (Vatan) emoluments, and "whatever settlement may be decided on for the Wuttuns "generally applid to them also. As a nuksan has hitherto "been shown for the Supa villages, we have, pending the "decision of Government, included it among the emoluments "of the Desais in our statement, but have not done so for "Chikli, as no nuksan has hitherto been shown for it, "and as the Revenue Commissioner, two or three years ago, "ordered the village to be fully assessed at the introduction "of the Survey which Captain Prescott has done, and the "Desais have appealed against."

(1) Papers (published by Government) relating to District Hereditary Officers' Watans in Surat Collectorate, 1866, p. 23. .

(2) Quit rent.



To inspire the Court with a general belief in the tendency and power of the Desais of Surat Zillah to absorb Government Revenue, and to shift their own proper burdens to the shoulders of the ryots, and also with a particular distrust of such of the Government revenue accounts as were in their keeping, the learned Counsel for the defendants dwelt much upon a passage in a minute of Mr. Mount Stuart Elphinstone, which we have also quoted in the note to our judgment in the Kabilpur case at pp. 255 to 257 of the report (1). We are, however, firmly of opinion that the remarks, which we have made in that note upon the passage there extracted from Mr. Elphinstone's minute, show that it has not any important bearing on the question whether either Kabilpur or Visalpur is liable to enhancement of assessment. Mr. Elphinstone's observations are far too general to admit of anything beyond a suspicion being founded upon them that the Desais may have exercised the general power which he attributes to them for their own benefit. We have in those remarks stated the two constructions which might be given to Mr. Elphinstone's minute. We adhere to what we have said in that note as to which of the two is the more probable and obvious construction, and will not here repeat what we have said on that point. Assuming, however, that the true construction is that Mr. Elphinstone, although he has not mentioned the private villages of the Desais, intended to include a charge against the Desais of fraudulently sparing those private villages, and levying the deficiency thus occasioned from the other villages when the former Government increased their demand for revenue on the whole pargana of Supa, we here reiterate what we have said in our note :—" It must be remembered that his observations are of a general character only, and that he does not enter into details. If he intended to imply that the Desais, in order to save their private villages from augmentation of revenue in any particular year, distributed amongst the other villages in a pargana, managed by them, the whole amount of the increase and thus spared their own villages, it does not thence follow that in every such

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(1) 12 Bom. H. C. Reports, Appx. 253, and See 3 Rev : Sel. pp. 698, 699.



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“case the Desais acted improperly. Take, for instance, Toli, and the three Vazifa villages which are admitted to be partially exempt from payment of revenue, there would not, on the pargana of Supa being subjected in any particular year to an enhanced revenue, have been any impropriety in the Desais omitting to place any part of the increase upon Toli and the Vazifa villages, and distributing that increase amongst such other villages in the same pargana as were not exempt, wholly or partially, from the payment of the land revenue. It still, therefore, notwithstanding Mr. Elphinstone’s remark, would remain a question whether any particular village was wholly unassessable or liable to limited assessment only. We must recollect that, although the Desais might once, twice, or more frequently succeed in fraudulently exonerating from enhancement of revenue some one or more of their villages not entitled to total or partial exemption, such a course of evasion could scarcely endure without detection for any very long period of years. When the Mahratta Raj became firmly established, the accounts were annually forwarded to Poona, the seat of the Peishwa’s Government, whence many of them have been brought as evidence in this (i. e., the Kaka-bilpur), cause.” We must here interpolate the words “and also in the present (Visalpur) cause.” We continue the quotation : “The uniformity of the annual assessment of a particular village could not then have escaped notice.” We should here remark that there is not an iota of evidence to show that the Poona Government ever took the Desais to task with respect to the uniformity and moderate extent of the land revenue paid by them for Visalpur and Kabilpur. We continue our quotation : “Supposing however that such might have been the case” (i. e., that the uniformity of the rent escaped notice), “and, therefore that such uniformity during the Mahratta rule is not deserving of much weight, it cannot be said that the British Government, whose eyes were opened to the malversations, real or supposed, of the Desais so far back as 1817, as appears from Mr. Elphinstone’s minute of 1821, and who had, therefore, to a large extent in Surat, substituted the rayatvari system for that of the Desais, was from 1817 down to 1870 equally blind



to that uniformity of assessment. The revenue accounts as constituted by Mr. Shaw, the Revenue Commissioner of Government, for the twenty-two years extending from A. D. 1848 to A. D. 1870 have, as already observed in the text of this (the Kabilpur) judgment, contained annual admissions of the validity of the plaintiff's claim to hold Kabilpur at a fixed yearly payment below the assessable value, and accordingly partially exempt from payment of land revenue." Pausing there, we must repeat that here too we have the Government accounts (1) for a full period of twenty-one years (1848-49 to 1868-69 inclusive) kept by Government officials, and long after the ascendancy of the Desais in the Zilla of Surat, as collectors or assessors of the revenue, had ceased (2), admitting in the most distinct and positive manner that the Desais were entitled to hold Visalpur at a small fixed rent (Rupees 28-4-4) although the assessable value placed upon it in those books during that period was Rs. 382-4-4. That sum was annually placed upon the debit side, but on the credit side annually appeared the fixed rent actually paid, Rs. 28-4-4, (occasionally described as "bandhi jama") and the balance Rs. 354 (3) credited as in respect of Mafi (Maphi, i. e., rent-free or exempted or alienated) land or "Inam Saranjam." It should be specially remarked that in some of the accounts during that period the Rupees 354 are sometimes divided into two sums, of which one "Rs. 17" is stated to represent "service," and the other "Rs. 337" is stated to represent "non-service,"

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(1) Exhibits 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176.

(2) Bombay Government Cir. No. 1070, dated 26th July, 1821 (papers relating to Hereditary Officers' vatans, printed for Government in 1866 at the Byculla Press, p. 14, para. 21, and p 31, para II) it was ordered (inter alia) " that the functions of Desais in assessing and collecting the revenue should cease but that they were to be made useful in any other way which the Collectors might deem expedient. "

(3) We should here notice two unfortunate misprints, one in the Government publication of 1866 of papers relating to the District Hereditary Officers' vatans in the letter of the Commissioners at p. 24 where the nuksan opposite Visalpur is stated as Rs. 554, and the other in the note in 12 B. H. C. Reports Appx. p. 263, containing an extract from that letter, which represents the nuksan as Rs. 524. The total (Rs. 5088) supplies the means of correction in both places, and shows that Rs. 354 is the nuksan intended to be shown.



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i. e., without service. It is not in the least degree likely that Desais, who denied their liability to render any service, participated in the preparation of those accounts (1). We here resume our quotation :—" These are facts against which " the learned Counsel for the appellants (defendants) have " in vain endeavoured to struggle. Again there is really " nothing to show that Mr. Elphinstone intended to apply " his remarks to the pargana of Supa or to the village of " Kabilpur" (or Visalpur), " There are, however, reasons " which render it extremely improbable that he could " have so intended. The Exhibit No. 32 (2), put in " evidence on behalf of Government, shows that the " persons under whom the plaintiffs derive their " title, were in possession of many, if not all, of the villages " in the pargana of Supa in Samvat 1714 [A. D. 1657-58], " and amongst those villages was Kabilpur " [and was also Visalpur]. " This was anterior to the irruption of the " Maharattas into Guzerat, subsequently to which Mr. Ped- " der describes the encroachments of the Desais as having " taken place," &c. &c. " The earliest recorded incursion into " Guzerat of Sivaji, the founder of the Maharatta power, " would seem to have been A. D. 1664, on the 5th of Janu- " ary, in which year he sacked the city of Surat [See Elphin- " stone's History 549, 4th Ed.; I Grant Duff 145, Bombay reprint]." Further we must observe again here 'that there is nothing in Exhibit 32; [i. e., Exhibit 46, Visalpur] to lead us to the conclusion that the possession by the Desais of Visalpur, Kabilpur, &c., at its date [A. D. 1657-58,] was a new possession.

Summarizing this case [independently of the parvana of A. D. 1763] we have then a possession by the Desais of the village of Visalpur commencing at least 214 years before the notice of enhancement of revenue, the occasion of this suit, which possession may have existed at a much earlier

[1] Exhibit 161, 162, 163, 164, 165, 166, 167, 168, 169, 170 171. These show that the item of Rs. 17 appeared in the accounts of Government from A. D. 1853-54 to 1863-64 inclusive. As to the denial by the Desais of liability to serve, see Papers relating to Hereditary officers' vatans, pp. 1, 8, 14, 18, 32, 33, printed for Government in 1866.

[2] Exhibit 46 in this case.



period. In A. D. 1691-92 we find what is alleged to be the normal rate [Rs. 29-12-0] assessed upon the village, i. e., 181 years before the attempted enhancement, and [omitting satisfactorily explained minute variations] we have that rate, with four exceptions, continuing at the same amount down to the cession of the 'country' to the British in A. D. 1802 [December 31st]—a period exceeding a century by eleven years—and thence until the notice of enhancement in A. D. 1872, a further period of seventy years, during the last twenty-one years of which the plaintiff's title to hold the village at a fixed rent has been admitted in the most distinct manner upon the Government books. Of the four exceptions which occurred under native rule [Rs. 125-14-0, A. D. 1724-25 ; Rs. 87, A. D. 1767 ; Rs. 61, A. D. 1770 ; Rs. 479-12-0, A. D. 1802] two are, we think, satisfactorily explained by the disturbed state of the country at the dates of the levies ; one is probably due to the same cause and is dubious, and the remaining one [Rs. 61] is also dubious. This would have been a considerable regularity in the recognition of the partial exemption of Visalpur from assessment, even if that exemption had been expressly granted by sanad so early as A. D. 1691-92, when we recollect the frequency with which oriental princes infringed upon rights created by their predecessors, and the changes of dynasty in Guzerat.

With this very strong case on behalf of the plaintiffs we have to contrast the following facts opposed to the allegation that the assessment was fixed, viz., that, at an early date amongst the accounts and subsequently, we have Toli described as Inam and three other villages described as Vazifa, whereas Visalpur, Kabilpur and many other villages were placed amongst villages confessedly Khalsa, that occasionally the Desais in their transactions (private deeds, partitions, &c.) entered into stipulations as to how the assessment, if enhanced, should be borne amongst themselves ; provisions which may however have been made *pro majori cautela* to meet the very possible infringement of their right. In Exhibit 46 (Visalpur), i. e., Exhibit 32 (Kabilpur), even Toli, admittedly an Inami village, was included in such a stipulation (1). That there are the

(1) 12 B. H. C. Appx. pp. 229, 230.



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four considerable exceptions anterior to British Rule to the uniformity of the rate of assessment, that a minute of Mr. Mount Stuart Elphinstone attributes great influence to the Desais and the exercise of it, but in which minute he makes no express reference to Supa in general, or Visalpur in particular, or directly implies that he intended to point to those places. That it is possible however that he did so intend, that it is probable that the Desais exerted their power to falsify the revenue accounts and to screen particular villages, and amongst them Visalpur, from enhancement of revenue. That Government cannot be regarded as wholly acquiescing in the fixity of their assessment, as some three inquiries into the matter were at various periods during British rule commenced, but never completed. It is impossible not to perceive that the case for the defence is much the weaker, even if the parvana of A. D. 1763 be removed from the case of the plaintiffs. If that parvana be, as we think it ought to be, added to the other facts in the plaintiffs' case, the disparity becomes greater. Under such circumstances as we have described, it was a very strong measure on the part of the Revenue Department to enhance a small assessment, a mere quit rent of 181 years standing, to a full assessment thirty-eight times as great as the ancient rate. Against the special description given to Toli and the three Vazifa villages, and the consequent inference that the others were khalsa, there are twenty years of express admissions in the British books that the village is partially exempt from assessment and held at a fixed rent. And there was a further a complete change of tactics on the part of the Revenue Department. We have seen that in 1820 Mr. Morrison was of opinion that Visalpur and four other villages in Supa and Chikli Kasba formed part of their vatan or emoluments as revenue officers, i. e., Desais, that Mr. Pedder and his fellow Commissioners for inquiring into the vatan of Hereditary Officers in Surat Collectorate were of the same opinion as to Visalpur and the four other villages in Supa, viz : that they were held at low fixed rents as a remuneration to the Desais for performance of duty of revenue officers. We further perceive from the letter of the Revenue Commissioner (Mr. Rogers) of



the 23rd November 1865 addressed to the Chief Secretary to Government that the policy, which he advised, was to put pressure on the Desais to serve as revenue officers in order to induce them to accept the "terms offered," i. e., to agree to pay three annas in the rupee of a full assessment (1). For that policy however was substituted in 1871-72 the full assessment of the village and notice of transfer of it to the rayats, if the Desais did not pay that assessment. It is clear that, neither in 1865, nor for some years afterwards, did the Revenue Department believe that it could venture to put a full assessment on the village, but regarded it as held on service, although very small evidence of liability to service was forthcoming. To a proposition by the Commissioners, that Government should declare that the disputed villages "shall all lapse on the deaths of the present holders," the Revenue Commissioner said in his letter of the 23rd November 1865 : "This would however look so like a " wholesale measure of confiscation, that it would be better " in my opinion to endeavour to carry out the other alternative, and exact some kind of service from every subdivision of a watan however small. This would probably " prove sufficiently objectionable to induce the Watandars " (the Desais) to come round to the terms offered " (2).

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We were referred during the argument in this case to a report made by an Assistant Collector to the Collector of Surat, dated 27th August 1869. It was not mentioned to us in the Kabilpur case, but we have since been informed that it was in fact amongst the exhibits in that case also. Though not written or dated subsequently to the institution of this suit, that report was so manifestly penned with an intention to produce the attempted resumption, which has occasioned this suit, as virtually to come within the spirit of the rule which excludes documents written *post litem motam*, and to deprive the report of any weight as evidence for the defendants in this cause. A single passage will suffice to show how unsafe a guide would be such a report. The

(1) See paras. 2 and 8 of the same letter in the "Papers relating to District Hereditary officers' Wattans" printed for Government in 1866, pages 1, 3 ; and 12 Bom H. C. Rep. Appx. p. 264.

(2) Ibid. Para 8, page 3.



1879- THE GOVERNMENT OF BOMBAY v. SUNDARJI. writer says of the villages of Jamalpur, Virwadi, Visalpur and Kabilpur : "I have drawn up the accompanying statements from the accounts, and from them it will be perceived how unfounded is the claim of the Desais to enjoy the villages at a fixed rent (bandhi-jama). Under the Mogul, Peishwa, and Gaekwadi Rule we find fluctuations yearly similar to that in the other Government villages of the district, and only during our own rule owing to the extraordinary influence the Desais exerted, have they kept the figures of the villages low, and now claim them at a fixed rent." Limiting ourselves to Visalpur, the case before us, the erroneous and hasty nature of the writer's assertion that the "yearly" fluctuation of assessment of Visalpur while under native rule was as great as in the villages admitted to belong to Government is manifest. We have seen that in one hundred and eleven years of native rule there were only four variations of any importance, while the variations in the assessment of admittedly Khalsa villages in the same pargana has been frequent and considerable. And this case is devoid of any evidence of the extraordinary influence which during British Rule kept the figures of the village low, i. e., at Rs. 29-12. The Mamlatdar Keshavlal Nathubhai, the principal witness for the defence in the Kabilpur case, admitted that "the Desais were never required to write in the Thana," i. e., in the Kacheri, during the British times, and, as above noticed in our note at page 191 *supra* the Desais have been since A .D. 1821 excluded by order of Government from taking any part in the assessment or collection of the revenue. It seems somewhat difficult to understand how such a report was admitted in evidence—it being neither more nor less than a departmental pamphlet, written after an *ex parte* inquiry, and advocating the policy, the attempt to effect which is the cause of the present action.

As in the Kabilpur case, so here, the enhancement is sought to be justified by Bombay Act I of 1865, Section 25 ; but we think that this case, as well as that of Kabilpur (1), falls within "the proviso with which that Section concludes" in favour of any land held and entered in the Land Regi-

(1) 12 B. H. C. Rep. App. pp. 270 to 272.

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"sters as wholly or partially exempt from payment of land revenue, except to such amount as is in the accordance with previous practice, or any law which has been, or may hereafter be, enacted relating to lands so held." We need not repeat, but we abide by what we said with reference to the "Land Registers" in the Kabilpur case (1). We think that the express entries in the Government Records from A. D. 1848-49 down to 1868-69 that Visalpur was partially exempt from land revenue, when combined with the previous entries from A. D. 1691-92 down to 1848, satisfy the exigency of that proviso.

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In conclusion we hold, 1st that Visalpur is an uhdad-bandhi-jama village, settled for, hereditarily and of right by the plaintiffs and their co-parceners, in the gross at a fixed immutable rent, independent of the quantity of land under cultivation any payable to Government, and falls within the protection of Regulation XVII of 1827, Section 8. 2ndly, that the plaintiffs have established that Visalpur is land situated in a district ceded by the Peishwa before 1803, that is on the 31st December 1802, to the British, held by the plaintiffs and their predecessors in title partially exempt from payment of Land Revenue under a tenure recognised by the custom of the country for thirty years and upwards, and therefore falls within the claims for exemption mentioned in Section 21 of Bombay Act VII of 1863 (2). And lastly that Visalpur is liable to assessment to the extent of Rs. 28-4-4 only, inasmuch as it falls within the concluding proviso in Section 25 of Bombay Act I of 1865 saving from further assessment a village entered in the Land Registers as partially exempt from payment of Land Revenue.

Accordingly, we affirm the decree of the District Judge with costs.

(1) 12 B. H. C. R. App. 271, 272.

(2) As to that Act we have already given our views in 12 Bom H. C. Rep. App. 248, 250 *et seq.*, 271.



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June 9.

Before Sir Michael Roberts Westropp, Kt., C. J. and Mr. Justice Melvill.

**The Government of Bombay (defendant) Appellant
v. BHIMBHAI SUNDARJI and others (plaintiff-
iffs) Respondents. ***

Injunction—Act X of 1876, S. 11.

Where the plaintiffs had obtained a decree declaring that the Government had not the right to enhance the revenue on their village, and the Collector, pending an appeal from such decree, took measures to levy such enhanced assessment, it was held that, though the plaintiffs might have obtained an injunction against the Collector by motion either in the Court which had passed the decree or in the High Court, that did not prevent the plaintiffs from bringing an independent suit for that purpose, and that S. 11 of Act X of 1876 did not apply. Even assuming that an application to set aside a Collector's order made to the Revenue Commissioner would be an appeal allowed by law within the meaning of that section, the present case was not within Bom. Reg. V of 1830, inasmuch as cl. 4, S. 1 of that Regulation would have excluded his intervention, as the claim to exemption from liability to enhancement of revenue had already been the subject of judicial investigation and was still *sub judice* in the High Court.

This is an appeal from the decision of the Judge of the District of Surat, in Original Suit No. 66 of 1876.

This case arises out of an illegal and somewhat contumacious proceeding upon the part of the Collector of Surat, who, after the District Judge of Surat had made a decree deciding that Government had not authority to enhance the land revenue payable by the plaintiffs to Government in respect of the village of Visalpur, and while an appeal to the High Court by Government was pending against that decree which was then unreversed and in full force, placed men in that village to prevent the reaping of the crops which he desired to retain as a security for the enhanced rent to which it had been decided by that decree that Government was not entitled. It is now admitted by the Government Pleader that such a proceeding was illegal, and he has informed us that Government, on becoming aware of the occurrence, directed the Collector to desist from his proceedings. That order is not in evidence. The Government Pleader says it was dated February 20th 1877, and it is not denied that Government did make such an order. The plaintiffs however had previ-

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ously, viz., on the 16th December, 1876, brought this suit for an injunction to restrain the Collector from acting as he was doing, and on the 21st February 1877, the District Judge made his decree granting the injunction as prayed. The defence was that Act X of 1876 rendered such a suit unsustainable.

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In point of fact, the plaintiffs might have obtained the relief they sought, viz., the injunction, by a motion, either in the District Court, in the Suit No. 4 of 1872 in which the District Judge made his decree of the 7th April 1873, or in this Court, in which the appeal against that decree was pending. However, the plaintiffs have taken the more circuitous course of bringing an independent suit (founded on that decree) for the injunction, and while it is admitted by the learned Government Pleader that the proviso (cl. k) in Sec. 4 of Act X of 1876 allows a claim to hold land wholly or partially free from payment of land revenue founded on a judgment of a Court of Law to be cognisable in a Civil Court, yet it is said that Sec. 11 of the same Act requires that the plaintiffs must first prove that, previously to bringing their suit, they have "presented all such appeals allowed by law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present." There is not in that Act any glossarial explanation of the term "appeals allowed by law." Reg. V of 1830 provides for the appointment of a Revenue Commissioner, who (Sec. I, cl. 2) has, "under such instructions as Government shall from time to time issue, control over the whole revenue administration of the provinces and over all the officers employed therein," but cl. 4 of the same section excepts from his jurisdiction "grievances" that have "already been made the subject of judicial investigation;" and the Government Resolution of February 25th of 1867, printed in Mr. Nairne's Revenue Hand Book, p. 26 1st ed., which allows an appeal from the Collector to the Revenue Commissioner "in all revenue matters, except when the Collector's decision is, by any special law, final," must be read subject to the limitation in cl. 4, of Sec. I. And it would indeed be extraordinary in a party who has obtained a decree against Government, which decree is yet under appeal, should, for any act



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of Government or its revenue officers in violation of that decree, have to resort for his remedy to the Government itself, or its revenue officers. Here the District Court had by its decree decided that Government had not any right to the enhanced revenue, and the Collector nevertheless coolly takes measures to enforce that revenue while the decree is yet under appeal. We think, as we have said, that a motion in Court would have been a sufficient mode of obtaining relief against this contempt of the Judge's decree, but that fact does not render a suit for the same purpose unsustainable, and even assuming that an application to set aside a Collector's order made to the Revenue Commissioner would be "an appeal allowed by law" within the meaning of Sec. 11 of Act X of 1876—a point which it is not necessary for us now to decide—we are of opinion that the present case is not within Reg. V of 1830, inasmuch as the 4th cl. of Sec. I of that Regulation would have excluded his intervention, as the claim to exemption from liability to enhancement of revenue had already been made the subject of judicial investigation, and was still *sub judice* in the High Court. For these reasons, we affirm the decree of the District Judge with costs.

June 11.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

**RAMBHAJI GANGAJI and others (plaintiffs) Appel-
lants v. MAHADJI YESUJI, deceased, his heir and
grandson Abaji Santuji, minor by his guardian
Gangai Santuji and others (defendants)
Respondents. ***

*Res Judicata, Objection raised at late period as to—Dis-
missal of former suit with leave to file fresh one.*

Where the objection of *res judicata* was raised at a late period of the hearing of the appeal the Court having regard to the decision in *Bhiso Shankar v. Ramchandra* (8 Bom. H. C. R. A. C. J. 80) and *Shridhar Vinayak v. Narayan Babaji* (11 Bom. H. C. B. 224) declined to allow the objection to prevail notwithstanding the decision of the Calcutta High Court in *Denobundhu v. Kristomonee* (2 Calc. 152), saying that in a former suit between the present parties, leave was reserved to the plaintiffs to bring this suit : and although such a permission would not of course operate to render admissible a suit which

• Appeal No. 22 of 1879 (p. 353 of P. J. 1879).

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was clearly inadmissible by law, yet the circumstance may well strengthen us in the resolution to adhere to the previous decisions of this Court on a doubtful point of law. Had it not been for those decisions, the Court which heard the former suit would no doubt have permitted the plaintiffs to withdraw from that suit with liberty to bring a fresh suit, and had that course been adopted no question could have been raised as to the admissibility of the present suit. It would be very inequitable to depart from the established course of decisions in this Court, when the effect of such departure would be to deprive the plaintiffs of a remedy which the Court trying the former suit intended to reserve to them by permitting a withdrawal, if not by inserting an order to that effect in its judgment.

This is a second appeal from the decision of the District Judge of Poona, in Appeal No. 106 of 1878.

It does not appear to have been denied, either in the Court of first instance, or in appeal, that the plaintiffs are co-sharers with the first defendant in the Mukadami watan. They are, therefore, in the absence of proof to the contrary, co-sharers in the house in dispute, which is shown by Exhibit 16 to be part of the watan property.

We think that, on a proper construction of Exhibit 16, it conferred on Mahadaji, the grand-father of the first defendant, no greater proprietary title, and no greater power of alienation, than he previously possessed, as one of several sharers in the watan. Exhibit 16 shows nothing more than that Mahadaji was, with the consent of his co-sharers, and apparently because he was the 'wadil' of the family, permitted to live in the house; an arrangement which was probably intended, [though it is not expressly so stated], to last during his life time; but certainly for no longer period.

The Subordinate Judge has found that Mahadaji had power to alienate his own share of the house in perpetuity. Assuming the watan to be a service watan, this opinion is open to criticism. But it is not necessary for us to consider the point, because the plaintiffs did not appeal on the question, and because the first defendant, who is Mahadaji's successor, acquiesces in the alienation. It is open to the Collector to consider whether he will set aside the alienation of Mahadaji's share of the house under the provisions of Section 9 of Bombay Act III of 1874,

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But we agree with the Subordinate Judge that, as regards the shares of the plaintiffs, Mahadaji was in the position of a trustee ; that their claim is consequently not barred by limitation ; and that they are entitled to a decree declaring that their interests are not prejudiced by any alienations made by Mahadaji.

They have also theoretically a right to claim a division of the house, but it is clear that a division of a small house among so many claimants will have the effect of rendering it worthless to everybody. We cannot refuse to make the division asked for : but we must express an opinion that it is desirable that the whole house should remain in the possession of a single member of the family who, for the time being, may appear best entitled to occupy it. The intention of the parties to Exhibit 16 seems to have been that the representative watandar, while discharging the duties of the office, should enjoy the possession of the house : and this arrangement appears to be the most reasonable and convenient which could be devised. Again assuming the watan to be a service watan, [for we have no certain information on the subject], the Collector would have power to give effect to such an arrangement by virtue of the authority conferred upon him by Section 23 of Bombay Act III of 1874. A copy of this judgment, and of the plaint, and Exhibit 16, will be sent to the Collector, in order that he may use his discretion in the matter. In the meantime, we reverse the decrees of the District Court, and restore that of the Subordinate Judge, with costs on defendants throughout.

It is necessary to observe that at late period of the hearing of this appeal, the respondents raised the objection that the present suit is barred, as being *res judicata*, in consequence of a previous suit between the same parties. Having regard to the decisions of this Court in *Bhisto Shankar Patil vs. Ramchandra Raghunath Jahagirdar* (1) and *Shri-dhar Vinayak vs. Narayan valad Babaji* and another (2), we declined to allow this objection to prevail, notwithstanding the decision of a majority of the Calcutta Bench in the case of *Denobundhu Chowdhry vs. Kristomonee Dosee* (3). In

- (1) 8 Bom. H. C. Reports 89. (2) 11 Bom. H. C. Reports 224,
(3) I. L. R. 2 Cal. 152.



the former suit between the present parties, leave was reserved to the plaintiffs to bring this suit : and although such a permission would not of course operate to render admissible a suit which was clearly inadmissible by law, yet the circumstance may well strengthen us in the resolution to adhere to the previous decisions of this Court on a doubtful point of law. Had it not been for those decisions, the Court which heard the former suit would no doubt have permitted the plaintiffs to withdraw from that suit with liberty to bring a fresh suit, and had that course been adopted no question could have been raised as to the admissibility of the present suit. It would be very inequitable to depart from the established course of decisions in this Court, when the effect of such departure would be to deprive the plaintiffs of a remedy which the Court trying the former suit intended to reserve to them, and which it had full power to reserve to them by permitting a withdrawal, if not by inserting an order to that effect in its judgment. It is the less necessary for us to reconsider the previous decisions of this Court, inasmuch as the question raised will, for the future, be set at rest by the new Code of Civil Procedure.

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*Before Sir Michael Roberts Westropp Kt., C. J. and Mr.
Justice Melvill.*

June 16.

SHRIDHAR BABAJI (plaintiff) Appellant v. The
Assistant Conservator of Forests, Kolaba (defend-
ent.) Respondent. *

Timber—Joint Survey Rules, 10 and 11.

Rules 10 and 11 of the Joint Survey Rules are not applicable to the Konkan in which the timber in question is situated.

This is an appeal from the decision of the District Judge of Thana, in Original Suit No. 4 of 1876.

The plaint substantially admits that the proprietary right in the teak-trees, the subject of this suit, was vested in Government, and insists on a right of pre-emption on the part of the plaintiff, whose pleader has referred this Court to Rules 10 and 11 in the Joint Survey Report, printed for Government in 1850 by the Press of the Bombay Education So-

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OF FORESTS,
KOLABA.**

ciety, and argued thence, in support of his point in the memo. of appeal, that the plaintiff was proprietor of the teak. But these rules, as is shown by the plaintiff's Exhibit No. 67, (dated 13th October 1862), a letter from Mr. Ellis, Revenue Commissioner for the Northern Division, to the Collector of Thana, are not applicable to the Konkan in which the teak-trees in dispute were situated. He says (para 2) : " It is hardly necessary to premise that the Rules of the Survey Joint Report have not been applied to the Konkan. " . The nature of this suit also is inconsistent with the proposition that the proposition that the plaintiff was the proprietor of the teak-trees, although he may in a certain sense, be so of certain Survey numbers in the villages in which they were growing. The next argument on behalf on the plaintiff was that the villages in question came under the description of " unreserved numbers " mentioned in the same letter of Mr. Ellis, and that clause [b] in division II of that letter, relating to teak and blackwood trees, [which clause proposes or provides that when such trees are " thin and few " they should " be offered to the holder of the land at a valuation ; and if refused, " the trees should " be cut down and sold, "] entitled the plaintiff to the right of pre-emption ; and that Exhibit 51, being a series of statements prepared, A. D. 1862-63, by the talatis [village accountants] of the number and valuation of the teak-trees in the various villages mentioned in the plaint, contained, in the margin, remarks to the effect that the owners of the Survey numbers are willing to purchase the tea-trees at that valuation. But there is a total absence of any evidence that a sale was made by the Collector or any other authorised officer of Government of the teak-trees in the plaintiff's villages at that or any other valuation to the plaintiff. His pleader urged that we ought to presume that there was such a sale, and relied on a passage at p. 174, para 33, of Mr. Nairne's first edition of the Revenue Hand Book, which is as follows :—" It is the policy of Government to divest itself of isolated forest property and, where there are no Government forests contiguous, teak and blackwood trees should be offered at a valuation to the occupants of the numbers they stand in. " But it is not pretended that the plaintiff either in 1862-63 or ever since

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paid the rates mentioned in Exhibit 51, and there is, as we have said, in our opinion, a total absence of any evidence of a sale to him under that passage or rule in Mr. Nairne's book or under any other rule. It may be that the Collector or Conservator of Forests has disobeyed that rule in Mr. Nairne's book, and may (if such were still the policy of Government) have laid himself open to reprehension by Government, but in the absence of a contract for sale to the plaintiffs, such disobedience affords no cause of action to the plaintiff, inasmuch as there is nought to show that the rule in Mr. Nairne's book has the force of law. In fact the evidence in this case tends to show a change in the policy of Government, which now seems to prefer selling the teak-trees by villages rather than by Survey numbers (i. e., by fields of individual holders in which they stand). We must affirm the decree of the District Judge with costs.

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SHRIDHAR
v.
THE ASSISTANT
CONSERVATOR
OF FORESTS,
KOLABA.

Before Mr. Justice Melvill and Mr. Justice Kemball.

June 17.

DULABH WAHUJI RANCHHODRAI by her Mukht-
yar Gumasta **Maniklall Amthadas**, manager of the
shop of **Ranchhodrai Chohtamrai** Applicant v.
LAKSHMAN PAHUJI, deceased, his
heir and son **Shivdas** Opponent. *

A plaintiff had a house at Broach to which she went every year for 5 or 6 months and she had gone there 4 months before she instituted a suit in the Nandurbar Court and had remained there for two months afterwards. Held that she was not resident within the local limits of the jurisdiction of the Nadurbar Court when the plaint was presented and she was therefore entitled to appear by a person holding a general power of attorney.

This is an application against the order of the Subordinate Judge of Nandurbar, dated 5th February, 1878.

The facts stated in the affidavit of the plaintiff's agent, and not contradicted by any affidavit on the other side, are that the plaintiff has a house at Broach, that she goes there every year for five or six months, that she had gone there four months before the institution of the suit, and had remained absent till the institution of the suit, and for two months afterwards. Upon these facts, we are of opinion that the

- Extra. Application No. 40 of 1879 (p. 367 of P. J. 1879).



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LAKSHMAN.
plaintiff was not resident within the local limits of the jurisdiction of the Nandurbar Court at the time when the plaint was presented, and she was therefore entitled to appear by a person holding a general power of attorney. We, accordingly, direct that the Subordinate Judge do receive the plaint, and, if in other respects in accordance with law, do register the same.

Before Mr. Justice Melvill and Mr. Justice Kemball.
July 9.

ABA SHIKI LADHA and others (defendants) Appellants
v. SHEIK MOHIDIN JAMAISAHEB (plaintiff)
Respondent.*

Procedure—Unnecessary party—Striking out such party in appeal—Ejectment.

If a person has been unnecessarily or improperly made a party without any objection by the plaintiff, the Appellate Court is not justified in removing the name of that person from the suit. In an ejectment suit a person under whom the other defendants claim to hold property is a necessary party.

This is an appeal from the decision of the District Judge of Belgaum, in Appeal No. 134 of 1877.

The course which the District Judge has pursued in striking the name of defendant No. 3 out of the record is one tending greatly to increase litigation. Even if defendant No. 3 had been unnecessarily or improperly made a party by the Subordinate Judge, yet, as that step was not objected to by the plaintiff before the Subordinate Judge, and as the parties went to trial on the issue of title as between the plaintiff and defendant No. 3 the District Judge would hardly have been justified in appeal in rendering the whole proceedings between the plaintiff and defendant No. 3 abortive, by removing the name of the latter from the suit. But we are of opinion that the suit being one in ejectment, it could not be properly decided without making defendant No. 3, under whom the other defendants claim to hold, a party to the suit : and in remanding the case to the District Court on the 22nd August 1876, this Court expressly pointed out that the question of tenancy between the plaintiff and defendants Nos. 1 and 2 could not

*Appeal No. 49 of 1879 (P. 397 of P. J. 1879).

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be determined, until it had been settled between the plaintiff and the third defendant which of the two is really the manager of the Musjid. We must now again remand the case, in order that the name of defendant No. 3 may be restored to the record, and the issue of title, as between him and the plaintiff, raised and determined. In deciding that issue, the District Judge should bear in mind that the *onus probandi* is on the plaintiff, and not on the defendant No. 3 that decrees obtained by the plaintiff, against tenants of the Musjid other than the defendants, are not evidence against the defendants, at all events, to any greater extent than is contemplated in Section 13 of the Indian Evidence Act; and that the plaintiff is bound to prove, not only that he was appointed by the Jamat, but that the Jamat had power to make a valid appointment. Costs to follow final decision.

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ABA

v.

SHAIK MOHIDIN.

Before Sir Michael Roberts Westropp, Kt. C. J., and Mr. Justice Melvill.

JULY 17

SHAIK IDRUS SHAIK AHMED (defendant) Appellant
v. VITHAL RAKHMAJI (plaintiff) Respondent. *

Mortgage—Payment of Government assessment by mortgagee, lien for—Mortgagor bound to pay before redemption.

A mortgagee who has paid the Government assessment on the mortgaged property has a lien for the amount on that property and is not bound to give up possession until that lien has been satisfied, because it is in the nature of a salvage claim.

This is a second appeal from the decision of the Joint Judge of Thana, in Appeal No. 508 of 1877.

The Joint Judge should not, in our opinion, have allowed to Shaik Idrus, the mortgagee, the item of Rs. 48 as interest from the date of the plaint to the 23rd December, 1874, when he obtained possession. Further, the item of Rs. 300 allowed to him as income of the village for Shake 1796 must be reduced to Rs. 250, that being the amount of clear profit rent after payment of Government assessment. The aggregate of these two reductions, viz., Rs. 98, must therefore be deducted from Rs. 1,402-2-3 named by the Joint Judge. That deduction reduces to Rs. 1,304-2-3, the sum which, in our opinion, the plaintiff Vithal must pay to Shaik

* Appeal No. 427 of 1878 (p. 407 of P. J. 1879).



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SHAIK IDRUS
v.
VITHAL.

Idrus by way of redemption of the mortgaged property. We differ from the Courts below as to the item of Rs. 500, with which they debited Shaik Idrus for not giving up that property on Vithal's tender of Rs. 703-3-4 named in the decree of the 25th February, 1875. We consider that Shaik Idrus had a lien on that property for the amount of the Government assessment paid by him for the Revenue year 1874-75, and notwithstanding the decree of the 25th February, 1875, which was silent on the subject of the Government assessment, was not bound to give up possession of the property until that lien was satisfied. It was in the nature of a salvage claim. The property would have been lost to both mortgagor and mortgagee if the Government assessment had not been paid, and the mortgagor (Vithal) by making away with the village income (as found by the Joint Judge) had left no means to the mortgagee to realize the amount of the Government assessment from that source, and the mortgagee Shaik Idrus had to pay it out of his own pocket. We vary the decree of the Joint Judge by directing that on payment by the plaintiff Vithal to the defendant Shaik Idrus of Rs. 1, 304-2-3 and the costs of the suit and of both appeals at any period within six calendar months from this 17th day of July, 1879, the plaintiff shall be entitled to redeem, and the defendant shall deliver up possession to the plaintiff of the mortgaged premises in the plaint mentioned, and that in default of payment by the plaintiff to the defendant of the said sum of Rs. 1, 304-2-3 and the said costs within the said period of six calendar months, the plaintiff shall be for ever barred and foreclosed from redemption or recovery of possession of the said mortgaged premises or any part thereof.

July 29.

Before Mr. Justice Melvill and Mr. Justice Kemball.
DOSIBAI, widow of JEHANGIRSHA ARDESHIR
(plaintiff) Appellant v. ISHWARDAS JAGJIVAN-
for himself and as guardian of his nephews CHABIL-
DAS JAMNADAS and MANSUKLAL GULAB-
DAS (defendants) Respondents. * .

* Appal No. 15 of 1878 (P. 418 of P. J. 1879.)

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Contract, breach of—Agreement to consent to application to raise attachment—Refusal by Court—

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DOSIBAI
v.
ISHWARDAS.

A judgment-creditor agreed on certain terms to consent to an application to be made by the judgment-debtor for the removal of an attachment obtained by the judgment-creditor, and did so, but the application was rejected by the Court of first instance. An appeal and second appeal were also unsuccessful, but the High Court suggested that an application for review should be made to the lower Appeal Court. After three years an application for review was made. An objection was raised to the review application which was granted and the review application was rejected.

Held that the judgment creditor was not liable in damages for breach of contract. He was not bound after so long a delay to renew the consent he had formerly given, and was not responsible for the Court's refusal to give effect to the arrangement formerly agreed upon. When the High Court made its order, or at the latest when a moderate time had elapsed without the plaintiff (judgment-debtor) having acted on the suggestion made by the High Court, the judgment-creditor had a right to consider the order of the Court of First Instance as final, and to act on it as final.

This is an appeal from the decision of the First Class Subordinate Judge of Surat, in Original Suit No. 648 of 1873.

M. MELVILL J.—It seems to me clear that a suit for specific performance will not lie.

Section 11 of Act XXIII of 1861 provides that all questions arising between parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit. The question whether the management of the estate should be taken out of the hands of the Collector, and entrusted to the present plaintiff and Awabai on certain terms, was a question arising between the parties to the suit, and relating to the execution of the decree. It could therefore, only be determined, and was in fact determined by the Court executing the decree.

Next as to the right of the plaintiff to damages for breach of contract, the Subordinate Judge has found that there never was any contract, and he certainly gives good reasons for that the conclusion. The plaintiff's case is that there was a complete contract before the 18th October, 1866, though with the plaintiff's consent it was modified in one detail on the 14th December, 1866. It is difficult to rely on

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oral evidence as to details of conversations which took place eight or ten years before the witnesses gave their evidence. If the parties had really come to terms, it would be natural to suppose that the plaintiff and Awabai, who had legal advice, would have insisted on those terms being reduced to writing. It seems to me, as it seemed to the Subordinate Judge, very difficult to hold, in the face of the documentary evidence, that the parties had come to terms on the 18th October, 1866. If such had been the case, the agreement would surely have been mentioned in the plaintiff's application of the 22nd October, 1886, (Exhibit 34). Instead of this, the application only makes certain proposals, and then goes on to say : "As there is no likelihood of the "plaintiff's" (i. e., Gulabdas) "objecting to all the above "proposals, we are anxious that the Court will be gracious-ly pleased to obtain an answer from the plaintiff with "reference thereto," The statement of the plaintiff's Vakil, made on the 30th November 1866, (Exhibit 31), indicates still more clearly that up to date no terms had been settled between the parties. He says, "I have made an applica-tion, No. 17 of 1866, to set aside the attachment : but the "plaintiff, the attaching-creditor is negotiating with us for "settling the matter amicably. I, therefore, do not wish at "present to proceed with the matter of the application to set "aside the attachment. I, therefore, cause the matter to be "settled. Therefore, be pleased to strike the matter off as "settled." Finally on the 14th December, 1866, (Exhibit 35), when Gulabdas, having been called upon by the Court to state whether he agreed to the plaintiff's proposals, put in his answer ; that answer, equally with the plaintiff's ap-plication was silent as to any agreement having been come to and treats the question as one open to discussion. "The "defendants," Gulabdas says, "have offered to pay Rs. "5,100, but I am not willing to accede to the said arrange-ment. I know that the income of the said villages has "greatly increased. Therefore, I submit that the Court "may appoint the defendants as managers, provided that "the defendants agree to pay me by instalments of Rs. 5,500 "every year, exclusive of expenses and risks, in the same "manner as the Collector carries on the management, and

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"recovers and pays each instalment, and provided that the Court takes security, and makes such an arrangement that my attachment will remain as it is, and that no impediment of any sort will be caused to my receiving Rs. 5,500 every year. In that case I have no objection to receive Rs. 5,500 every year, according to what is stated above, as long as the management will remain in the hands of the defendants." In a postscript to this answer, Gulabdas expresses his willingness to take Rs. 5,475 a year, instead of Rs. 5,500 and the present plaintiff states that she consented to pay the sum. The natural conclusion from the documents which I have quoted, clearly is that, upto the 14th December 1866 nothing had been finally settled, though negotiations between the parties had certainly been carried on. If the parties had really come to terms, why did they not make a joint application to the Court, stating the terms of the agreement, and asking the Court to give effect to it? The evidence on both sides shows that in September 1866, the plaintiff's Vakil prepared the draft of a joint application, but that Gulabdas refused to sign it, and that all that Gulabdas could be induced to say was that if the plaintiff and Awabai made an application to the Court, he would put in his answer. No doubt, the understanding was that, if satisfied with the terms offered, he would consent that the plaintiff and Awabai should be put in possession of the villages : but he seems to have reserved to himself, until the last moment the option of accepting or refusing the terms offered. It is argued that unless an agreement had positively been come to, the plaintiff and Awabai would never have withdrawn their application to raise the attachment, nor would have consented to refer to arbitration certain questions of account pending between them and Gulabdas. But, as already observed, Exhibit 31 shows that the applications to raise the attachment was only temporarily withdrawn, pending negotiations which were incompatible with an intention to proceed with the application : and there was nothing to prevent the application being renewed, if the negotiations did not terminate satisfactorily. Nor can any argument be founded on the reference to arbitration, which would appear to have been rather for the benefit of the plaintiff and Awabai than

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of Gulabdas. If the questions in dispute had been taken into Court, Gulabdas would almost certainly have succeeded, and the plaintiff and Awabai would have had to bear the costs of a very expensive suit.

Assuming, however, that there was a promise on the part of Gulabdas, and that the withdrawal of the application for arising the attachment, and the consent to refer to certain questions to arbitration, was a sufficient consideration to support such a promise, the questions remain, what was the nature of that promise? and how was the promise broken? Both the plaint and the evidence are vague on this point. It is stated in the plaint that Gulabdas promised that he would cause the villages to be made over into the possession of the defendants. The most that this can mean is, that Gulabdas would ask the Court to make over the management to the plaintiff and Awabai. And the most that can be made out of the evidence is, that Gulabdas promised that, if the plaintiff and Awabai made an application to the Court, he would give his consent to their proposal. This promise Gulabdas performed; but the Principal Sadr Amin refused to give effect to the wishes of the parties. The plaintiff and Awabai took the matter up in appeal to the District Court and the High Court. The District Court refused to interfere: the High Court rejected the application on the ground (as it is stated) that there had been no error in law: by which was probably meant that the appointment of a manager was within the discretion of the Court executing the decree. It does not appear that Gulabdas raised any opposition to the rectification of the Principal Sadr Amin's order either by the District Court or by the High Court. No breach of contract is alleged to have occurred previous to the order of the High Court, nor until nearly two years afterwards. The order of the High Court was made on the 1st May, 1867: and it is said that this order, rejecting the plaintiff's application, was accompanied by a suggestion to the appellants that they should apply to the District Judge for a review for his order appealed against which had been made on the 21st October, 1866. The plaintiff and Awabai did nothing until the 16th October, 1869,

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When they presented an application for review to the District Court. On a rule nisi being issued, Gulabdas put in a written statement, objecting to the admission of a review, on the ground, firstly, that no ground had been shown for the delay in applying for the review, and secondly, that no review could be granted after a special appeal had been admitted. On being examined by the District Judge, Gulabdas declared himself unwilling that the Court should give effect to the arrangement to which he had given his consent in 1866 ; and thereupon the District Judge rejected the plaintiff's application, on the ground that he could make no order without Gulabdas' consent. It is this refusal of Gulabdas to renew his former consent which is relied on as a breach of contract. But I find it impossible to say that Gulabdas was under any obligation to renew in 1869 the consent which he had given in 1866. There is nothing in the evidence nor even in the plaint, to warrant the conclusion that Gulabdas did anything more than promise to go into court, and consent, on certain conditions, to the proposals contained in the plaintiff's and Awabai's application of the 7th April, 1866. This he did. It was not his fault if the principal Sadar Amin refused to give effect to the arrangement consented to by the parties. It may perhaps be said that Gulabdas was bound to adhere to his consent, so long as the rectification of the Principal Sadr Amin's order was under consideration in appeal and special appeal, and even perhaps during proceedings in review, if the suggestion made by the High Court had been acted upon within a reasonable time. But this also he did : or at all events there is nothing to show, and it is not alleged, that he did not. He did not retract his consent until an application for review was made nearly three years after the date of the District Judge's original order, and a year and a half after the decision of the High Court. No reason whatever was assigned for this long delay. Can it be said that, after this long interval of time, Gulabdas was bound to consent that the question should be re-opened, and the wishes of the plaintiff and Awabai carried out ? It appears to me that he was under no such obligation. The observations of the Judicial Committee in Maharaja Mohe-

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shar Singh vs. The Bengal Government (1) apply to this case. When the High Court made its order, or at the latest when a moderate time had elapsed without the plaintiff having acted on the suggestion made' by the High Court, Gulabdas had a right to consider the Principal Sadr Amin's order as final, and to act upon it, as final. He would have been fully justified, for instance, in assigning his rights under the attachment to a third party, and in so doing to contract on the footing that the villages were to be managed by the Collector, and that the annual income was nearly Rs. 7,000 a year, (as is stated in the plaint to have been the case) : and it is clear that the rights of such third party would have been very injuriously affected, if it had afterwards been decided that the villages should be managed by two Parsi ladies, and that they were only to pay Rs. 5,475 per annum.

On the whole, I am of opinion, for the reasons which I have given, that there was no breach of contract on the part of Gulabdas.

The decree must be confirmed with costs.

C. G. KEMBALL. J.—I concur in thinking, for the reasons stated that the decree of the Court must be affirmed. Although we are now directly concerned with the proceedings which followed upon the application of the ladies of the 22nd October, 1866, I think it necessary to observe, with reference to the order therein of the Principal Sadr Amin, that the so-called wishes of the parties were not simply for the transfer of the management from the Collector, the consent of Gulabdas to the grant of the ladies' prayer being given conditionally on the Court's undertaking to see that the ladies fulfilled in the future their part of the agreement. Probably this was not brought to the notice of the High Court, when they rejected the special appeal on the 1st May, 1867.

(1) 7 Moore's Ind. App. 303.

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*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Melvill.*

**RAMBHAT GANGADHARBHAT (defendant) Appellant
v. RAMCHANDRA CHINTAMAN (plaintiff)
Respondent. ***

1879:

July, 30.

*Mortgage of vriti in gahan lahan form—Sale of the Mort-
gaged property to third person.*

A mortgaged his vriti to B in *gahan lahan* form. The mortgage money was not paid off within the time stipulated, and the mortgagee did not treat the mortgage as irredeemable. *Held* that the sale of the Vriti by A to a third person was binding and valid.

This is a second appeal from the decision of the the Joint Judge of Thana at Nasik in Appeal No. 172 of 1877.

The adoptive father (Chintaman) of the plaintiff, in 1851, mortgaged the vritti to Gadray for Rs. 600 at 12 per cent. by a *gahan lahan* mortgage. The mortgage money was not paid off within the six years named in the mortgage, at the end of which period the mortgage was to be converted into a sale in default of the payment. Gadray properly made no attempt to treat the mortgage as irredeemable, and accepted, in 1857, payment of the amount due (Rs. 950) from Ramabai, the widow of Chintaman, which she procured from the defendant Rambhat by selling to him, with consent of Gadray, the vritti for Rs. 985, of which sum Rs. 950 were paid to Gadray, and Rs. 35 were retained by Ramabai. That is admitted here on appeal to have been a valid sale. Chintaman having died without leaving a son, and Ramabai, having succeeded to him as his heir, was in that capacity bound to pay off the mortgage debt, and rightly did so out of the proceeds of the sale. Subsequently, in 1861, Ramabai was favoured by a gift of a large sum of money from a lady of the Pantt Sachiv family of Bhore to enable her (Ramabai) to adopt a son. Ramabai did then adopt the plaintiff Ramchandra as son to her deceased husband Chintman and herself. The defendant is stated to have been a consenting party to the adoption and to have attested the deed of adoption, which deed is not in evidence in this case, but a plaint, (No. 61), filed by Ramabai on behalf of the present plaintiff in 1862 against the present defendant, alleged that it was stated in that deed that,

* Appeal No. 182 of 1879 (p. 426 of P. J. 1879.)



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v.
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“ upon the release of the vritti from the management of “ Rambhat, I (present plaintiff Ramchandra) should go on “ enjoying the profits thereof.” But that provision in the adoption deed, if correctly recited in that plaint, (61), does not in any manner bind the defendant Rambhat to restore the vritti to the plaintiff, or to Ramabai for him, for any specific sum, or any sum different from what the defendant might think proper. Ramabai, not having obtained a certificate of guardianship or administration of the minor’s estate, withdrew her suit with liberty to bring another when duly authorised. She did not bring any other suit. The plaint (61) in the withdrawn suit stated that for repurchase of the vritti she had offered Rs. 985 to the defendant, and that he had refused that sum but it is not in that plaint alleged that the defendant had agreed to resell the whole vritti at that price. The Subordinate Judge seems to think that there was a contract in 1862 to resell, but has not found at what price. The Joint Judge has not found that there was such a contract. There is not any written evidence of such a contract. The direction of an issue was suggested in argument for the plaintiff (respondent) as to there being a contract for resale of the whole vritti, but on consideration of the absence of written evidence of any such contract, and of the fact that no contract to sell at a fixed price was alleged in the former suit, and that eventually Ramabai and the natural father of the plaintiff, while he was a minor, found it necessary to give Rs. 1100 for the repurchase of $\frac{3}{4}$ th of the vritti and to permit the defendant to retain $\frac{1}{4}$ th of it, the plaintiff’s pleaders have wisely, and to avoid useless expense, not pressed for such an issue. Rambhat being the lawful owner by purchase was at liberty to fix his own terms, and it was on the acceptance of these terms by Rambai and the natural father of the plaintiff, that the plaintiff, recovered and was in possession of $\frac{3}{4}$ th of the vritti.

We must, therefore, reverse the decrees of the Court below, and declare the defendant Rambhat entitled to retain one-fourth of the vritti, and the plaintiff Ramchandra entitled to retain the remaining three-fourths of the vritti. The plaintiff must pay to the defendant the costs of the suit and both appeals.



Before Mr. Justice Melvill and Mr. Justice Kemball.
1879
August 18--
WAMAN BHIWAJI (defendant) Appellant v. VINAYAK.
(plaintiff) Respondent.*

Land tenure—Suti land—Ejectment—Onus probandi.
A person holding lands as *sutidar* is not liable to enhancement of land assessment nor to ejectment so long as he pays such assessment as is warranted by the custom of the country.

The burden of proving that his tenure is that of a *sutidar* and not that of a mere tenant at will lies on the person who asserts it.

The term ' *suti* ' is equivalent to the term ' *mirasi* ' in the Deccan.

This is a second appeal from the decision of the District Judge of Thana, in Appeal No. 568 of 1877.

It appears to us that this case has not received the full consideration which its importance demanded, and that some of the most material portion of the evidence have been misunderstood and misconstrued.

The plaintiff, who holds a lease from Government of the village of Bhynder, seeks to eject the defendant on failure to pay an enhanced assessment, on the ground that the defendant's land forms a portion of the lands described in the lease as ' *eksali* , ' and that by the terms of the lease he is entitled to collect, in respect of such lands, such rents and payments as he shall think fit.

It is admitted by the defendant that his land does form a portion of the lands described in the lease as ' *eksali* . ' His contention, however, is that the description is incorrect, and that his land is not ' *eksali* , ' but ' *suti* ; ' and that, as a ' *sutidar* ' he cannot be ejected, so long as he pays the customary assessment of one-third of the produce.

We agree with the Courts below in holding that the burden of proving his contention lies upon the defendant and that the plaintiff must succeed, unless the defendant can show that his land is ' *suti* ' land.

The defendant has not attempted to produce any evidence bearing exclusively on the tenure of his own particular land. It is certain that he held his land before the grant of a lease to the plaintiff in 1863. His name first appears in the Government accounts in 1858-59, (Exhibit 74), and not, as the District Judge supposes, in 1860-61. Previously to that date the collection of the assessment from the cultivators of

*Appeal No. 428 of 1878 (P. 429 of P. J. 1879.)



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the Bhynder-khar, (which was originally described as Sirkar Ardhale-khar, and afterwards as Sirkar Tizai-khar) was farmed out for a lump sum, and consequently, the names of the cultivators were not entered in the Government accounts. The defendant, therefore, is not to be prejudiced by the fact that he cannot show that his name was entered in the account before 1858-59 : but on the other hand, he is deprived of the evidence which might have been forthcoming, if the system of collecting the assessment in the Bhynder-khar had been different. He has produced various instruments of mortgage and sale : but it does not appear that the lands conveyed by these instruments are capable of identification. On the whole, the defendant cannot carry his own individual possession back further than 1858-59, though there is every reason to suppose that he was in possession at an anterior period. His inability, however, to prove a longer possession is of little consequence, inasmuch as mere length of possession would not establish his case, unless he could show that his tenure had been that of ' sutidar, ' and not that of a mere tenant at will.

What the defendant asserts, and what his evidence is intended to prove, is not that his own particular land is held on an exceptional tenure, but that the whole of the lands in the Bhynder-khar, and necessarily, therefore, his land, which forms a portion of the khar, are held on the ' suti ' tenure. The question for decision is, whether he has succeeded in establishing this proposition.

It may be observed that there is nothing improbable in the defendant's assertion that the whole of the lands in the Bhynder-khar are ' suti ' ; a term which may be taken to be equivalent to the term ' mirasi ' in the Deccan, and to mean land of which the holder is proprietor, subject to the payment to Government of a certain defined share of the produce. On the contrary, the presumption is rather in favor of the assertion, if it be true, as stated in the Collector's letter to the Revenue Commissioner, (Exhibit 206), that " the embankments of the Bhynder-khar were originally ' constructed by the Ryots of the village at their own cost. ' " Upon the authorities discussed in the Canara Land Assessment. Case Vykunta Bapuji v. The Government of Bom

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bay, (1) it would probably be right to conclude, that land re-claimed by private enterprise, should, in the absence of cir-
proving the contrary, be regarded as the 'miras' or 'suti'
cumstances of the person who reclaimed it, and of his heirs
and assigns.

In the lease, (Exhibit 9), granted to the plaintiff, about
1844 acres in Bhynder are entered as 'eksali,' and only
about 57 acres as 'suti'. The information on which these
entries are based is stated in the Collector's letter, Exhibit
208, to have been obtained from the records of the Mamlat-
dar of Salsette. Such of the records as have been produced
in this case do not, (as we shall presently show), support
the correctness of these entries : and that they must have
been somewhat carelessly made is shown by the circum-
stances that one field (Sub No. 8 of Survey No. 216), in
which the proprietary right (*malki*) had been actually sold
by Government to the defendant, (Exhibit 16), is entered
in the schedule of the lease as 'eksali.' It is not necessary
to say more on this point, because the defendant is of
course not bound or affected by any of the statements con-
tained in the lease. And, equally as a matter of course, he is
not, affected by any of the statements made by Major Francis,
to which the Subordinate Judge in his judgement refers.

Having made these preliminary observations, we proceed
to notice the particular instances in which the Courts below
appear to have been misled in their appreciation of the
evidence.

The District Judge says, " I concur with the learned Sub-
" ordinate Judge in considering that the evidence of Bhikaji
" Ramchandra, witness No. 62, who was Mamlatdar of
" of Salsette from 1857 to 1864 A.D.: of Trimbak Jagannath,
" the first karkun in the Mahim Taluka, witness No. 155,
" who was talati at Bhynder in 1839-40. A. D., and of
" Narayan Balwant, witness No. 182, formerly a Salsette
" karkun and now Mamlatdar to Wada, prove the existence
" of ' eksali ' lands at Bhynder." Of the three witnesses
here named by the District Judge, two, viz., Nos. 62 and
182 certainly do speak to the existence of ' eksali ' lands at
Bhynder ; and as it is for the lower appellate Court, and

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not for this Court sitting in second appeal, to appreciate the value of the evidence, we carefully refrain from expressing any opinion as to the weight which should be attached to the statements of these two witnesses on the point. But as regards the third witness, No. 155, we fail to find in his evidence any statement to the effect that during his tenure of office at Bhynder there were any 'eksali' lands in the village. On the contrary, we find the witness deposing as follows :—"Chikli 'eksali' is applied to such lands as being waste are taken up and cultivated without Government sanction. In the khate-vahi for 1839-40, which I refer to, I do not see any lands therein described as Chikli 'eksali'. "These terms were not obtaining in Bhynder during any time, that is, in 1839-40." It may, no doubt, be said that this witness speaks to the existence of Government land in Bhynder, and that it does not much matter whether such land was called 'eksali' or anything else. But the whole of the plaintiff's evidence, including the lease, is given to prove that certain lands in Bhynder were held on a tenure which was ordinarily known and described as 'eksali', and which by its very name denoted that the tenant was a mere tenant from year to year : and it is clearly a strong point in defendant's favour, when he comes to deal with the whole of the plaintiff's evidence on this point, if he is able to prove out of the lips of one of the plaintiff's witnesses, who was himself a *talati* at Bhynder, that in fact no such term as 'eksali' was known in Bhynder. It is at any rate a very inaccurate description of the effect of this witness' statement to say, as the District Judge says, that he proves the existence of 'eksali' lands at Bhynder.

After the passage which we have quoted, the District Judge proceeds as follows : "I concur with the Subordinate Judge in his reasoning, which I need not recapitulate, that the defendant has (except Survey No. 216, Sub. No. 8) failed to bring the lands occupied by him within the exceptions in the lease, and that, moreover, the evidence shows that they are lands of the description designated as 'eksali' (land held on "yearly tenancy) in the lease and in the plaint." The District Judge having thus identified himself, in respect of his conclu-

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alons and the reasons for the same, with the Subordinate Judge, it becomes necessary for us to consider, and make some observations on, the judgment of the Subordinate Judge.

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We agree with the Subordinate Judge that, for the reasons stated by him, the experimental introduction of survey rates, and the demarcation of Bhynder into survey numbers, cannot affect the defendant's position, inasmuch as there was no final settlement made, approved, and confirmed under the authority of the Governor in Council. We are also not prepared to say that the Subordinate Judge was not justified in refusing to draw any conclusion favorable to the defendant from the Exhibits Nos. 137 and 138, though, no doubt, such a conclusion might possibly be drawn from the documents. But as regards some of the documents in the case, the Subordinate Judge seems to have gone widely astray. Regarding Exhibit 73, one of the most important documents in the case, he writes as follows: "The next document, Exhibit 73, filed on behalf of the plaintiff, is the pahani-kharda or memo of survey for 1850-51. From this document it appears that the whole of the lands, whether in mudas or bigas, are entered as 'suti eksali.' It is, however, stated therein, at the beginning, that the shape or quantity (?) of land in 440 mudas, 12 $\frac{3}{4}$ faras, and 3 pailis is not entered in the name of cultivators, because a sale is made of the produce. In No. 5 of the same Exhibit it is stated that waste Government land was bigas 48-4-4, out of which is deducted land cultivated as eksali this year. Again in No. 6 it is stated that waste Government land is 25 bigas, out of which is deducted land cultivated as eksali the said year. Then follows a total of the land cultivated, in which the whole of the lands in mudas and bigas are entered as suti eksali." It is difficult to understand what the Subordinate Judge means by saying that the land is entered as suti-eksali, which would be a meaningless contradiction in terms. Where the words 'suti' and 'eksali' occur in Exhibit 73 in contiguity to one another, they are intended as headings of different columns, and in every instance it appears that there is no entry in the column headed 'eksali.' In the first entry in Sub No. 1 of this



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Exhibit, the whole of the Dhepik land (in which the defendant's land is admittedly included) is entered as being " cultivated 'suti' land," and in the entries in Sub Nos. 5 and 6, to which the Subordinate Judge refers as showing deductions on account of 'eksali,' there is in fact no deduction at all, a cypher being written under the heading Deduct therefrom land cultivated "in the current year according to 'eksali'." In the total to which the Subordinate Judge refers as showing that the whole of the lands in mudas and bigas are entered as 'suti eksali', the words 'suti' and 'eksali' are, as we have said, headings of different columns, and it appears that all the land is entered under the head of 'suti,' and none at all under the heading of 'eksali.' The Exhibit No. 73, therefore, which has been used by the Courts below, as showing the existence of 'eksali' land in Bhynder, shows really nothing of the kind, but, on the contrary, affords strong evidence in support of the defendant's allegation that the whole of the land in Bhynder is held on the 'suti' tenure. The Subordinate Judge has also made a very important mistake in regard to the meaning of the expression 'suti eksali', used in Exhibits Nos. 17 and 18. This term does not mean, as the Subordinate Judge translates it, allowance made for 'eksali' waste land, but (as a reference to Blane's Forms of village accounts will show) remission granted for a single year. It has, therefore, no bearing whatever on the question whether or not there was any 'eksali' land in Bhynder. Similar observations may be made regarding the Subordinate Judge's remarks upon Exhibit 126. He says, "I have pointed out 'one or two instances in the former part of my judgment " from plaintiff's Exhibit No. 73, but I would take the defendant's Exhibit No. 126, which is a pahani-kharda of " waste and cultivated lands in Bhynder for the year 1849-50. Let us turn to No. 5, and we see it stated that Government waste land bigas 48-4-4 [*sic*], out of which deduct land cultivated as 'eksali,' the rest of the land waste " 48-4-4. Now, if any meaning can be attached to these " words, it would be that the whole of the land either in " mudas or bighas was Government waste land, out of " which the cultivation 'eksali' was so much." It is im-

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possible to understand what the Subordinate Judge means by this. If the Government waste is entered as bigas 48-4-4, and it is added that, 'after deducting land cultivated as 'eksali' there still remains bigas 48-4-4 Government waste, the only conclusion is that no land at all was cultivated as 'eksali'. And, indeed, this appears to be the manifest deduction to be drawn from the document. Exhibit 126, throughout.

The observations which we have made indicate the portions of the evidence which in our opinion, have been misconstrued. They are very important portions of the evidence, and they have been used against the defendant as showing the existence of 'eksali' land in Bhynder, whereas in reality they seem to us strongly to support the defendant's case that there was no 'eksali' land in Bhynder. We are unable, sitting in second appeal, to come to a conclusion on the facts of this case, and we are, therefore, unwillingly compelled to remand the case for a reconsideration of the whole evidence, and for a fresh decision by the Court below. The responsibility of deciding the question of fact rests entirely upon the lower Appellate Court, and though we have pointed out the errors which appear to us to have been made in the first consideration of the case, we have no intention whatever of influencing the District Judge's opinion in favour of either party.

If the District Judge should, on a reconsideration of the case, come to the conclusion that the plaintiff has proved that his land is 'suti' land, he will then have to consider what rate of assessment the plaintiff is, by the custom of the country, entitled to demand, and whether the enhanced assessment demanded by the plaintiff is in excess of such amount.

The Court reverses the decree of the Appellate Court, and remands the case for retrial. Costs to follow final decision.

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1879 : *Before Mr. Justice Melvill and Mr. Justice Kembell.*
August 11. : UMABAI SAHEB MAHARAJ, guardian of BABA
MAHARAJ, a minor *In re.* *
Act XX of 1864, S. 26—Kolapur.

Kolapur not being within the Presidency of Bombay, the District Judge cannot, under S. 26 of Act XX of 1864, order a minor to be sent there for education.

This is an appeal against the order of the Judge of Poona, in Application No. 5 of 1878.

We think that the District Judge was in error in holding that Kolapur is within the Presidency of Bombay. It was not, therefore, in our opinion, competent to the District Judge (under Section 26 of Act XX of 1864) to order the minor to be sent for education to Kolapur. We, therefore, reverse his order of the 7th July, 1879, and suggest to him that he might arrange for the boy being sent to Satara, if he thinks that he can be properly educated there, or for his having a separate residence at Poona and attending the High School there, if, in the District Judge's opinion, such an arrangement will effect the object in view. This latter arrangement has been assented to by Umabai's pleader in this Court.

July 31. : *Before Sir Michael Roberts Westropp Kt., C. J. and Mr. Justice Melvill.*

BAPU MAHADAJI *et al* (plaintiffs) Appellants *v.*
VYANKATRAV RAMRAV (defendant No. 2)
Respondent. †

Parties to suit for rent.

The plaintiff sued D. for use and occupation of lands of which the plaintiff was mortgagee in possession. At D.'s request. V., whose tenant he alleged himself to be, was made a party to the suit, and V. alleged that the plaintiff's mortgage had been paid off by him, and possession given to him.

Held that it was erroneous to dismiss the suit as being one, though nominally for rent, yet really to decide a dispute between rival mortgagees and thus a fraud on the revenue.

V. had been made a party not at the request of the plaintiff, but at the request of D., and therefore the plaintiff was entitled to have the question of his right to recover the rent determined.

• Appeal No. 7 of 1879 (P. 435 of P. J. 1879).

† Appeal No. 117 of 1879 (P. 441 of P. J. 1879.)

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This is a second appeal from the decision of the Acting Assistant Judge of Thana, in Appeal No. 235 of 1877.

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The plaintiffs sued Dowlatrav for use and occupation of lands of which the plaintiffs were mortgagees in possession from Dhondbarav, the father of Dowlatrav. Dowlatrav's defence was that he held as tenant under Vyankatrav and had paid the rent to him, and that he ought to be made a party. Vyankatrav having been made a party said that the plaintiffs' mortgage had been paid off by him (Vyankatrav) 1872, and possession then given to him (Vyankatrav) as mortgagee from Dowlatrav, and that Dowlatrav had paid him the rent for which the plaintiffs were suing. The Subordinate Judge found that the plaintiffs' mortgage had not been paid off, and that plaintiffs were in possession as mortgagees and entitled to the rent, and he made a decree that Vyankatrav (he having admitted that he had received the rent) should pay it over to the plaintiffs. The Assistant Judge being of opinion that the suit was brought nominally for rent, but really to decide the dispute between rival mortgagees, held it to be a fraud on the revenue, and, therefore, unsustainable. He, accordingly, reversed with costs the decree of the Subordinate Judge. However, the Assistant Judge seems to have overlooked the circumstance that Vyankatrav was not made a party at the request of the plaintiffs, but at that of the original defendant, Dowlatrav. We think that the plaintiffs were entitled to have the question of their right to recover the rent determined. The circumstance that in the determination of that question it may be necessary to ascertain whether the plaintiffs were still mortgagees during the period for which they were seeking to recover in respect of Dowlatrav's use and occupation of the land, does not deprive the plaintiffs of their right to have the validity of this demand inquired into and determined. We, therefore, reverse the decree of the Assistant Judge, and remand this cause for a new trial on the merits by the District or Assistant Judge. Costs of suit and both appeals should be then disposed of as may be just.



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August 4.

*Before Sir Michael Roberts Westropp, Kt. C. J and Mr.
Justice Melvill.*

**YESHVADABAI SAHEB (plaintiff) Appellant v.
GANGADHAR *alias* TATIA SAHEB BALVANT
(defendant) Respondent. ***

**Res judicata—Ejectment—Suit based on lease—subsequent
suit based on mortgage.**

The dismissal of a former suit to recover possession of land based on an alleged lease on the ground that the lease was not proved, does not operate as *res judicata* so as to bar a subsequent suit for the same property based on a mortgage,

This is a second appeal from the decision of the District Judge of Satara, in Appeal No. 65 of 1878.

The cause of action, stated in the suit of 1866, was the refusal of the defendant to deliver up possession on the termination of an alleged lease for nine years. The present cause of action is different, the plaint (which is badly drawn) being one to recover the land as inamdar from the defendant, who relies on a mortgage from the mother-in-law of the plaintiff. The real questions on the merits seem to be, whether that mortgage was executed and if so, whether the plaintiff is bound by it, and those questions do not appear to have been ever tried, and, therefore, cannot, we think, be regarded as *res-judicata*—see *Bhiso Shankar Patil vs. Ramchandraw* (1), and *Bibu Lakshman vs. Ganesh Raghunath* and another (2). There is a third question, whether the plaintiff's suit is barred by the law of limitation. We must reverse the decrees of the Courts below, and remand the cause for retrial on all of those questions. In determining the question of limitation, the Court should consider whether the defendant is a mortgagee, for if he be so, and the plaintiff is bound by the mortgage and is willing to redeem she would be entitled to 60 years to redeem. If the defendant fail in establishing the mortgage, and that it is binding on the plaintiff, and fall back on a case of adverse possession the Court should consider whether the case is taken out of the twelve year limit by payment of rent made by the defendant to the plaintiff, either voluntarily or on compulsion

* Appeal No. 162 of 1879 (P, 442 of P. J. 1879.)

(1) 8 B. H. C. B., A. C. J. 89.

(2) 2 P. J. 66.

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of the Courts. So long as there was payment of rent, there was tenancy; and if there was tenancy, the possession would not be adverse. Costs of suit and both appeals should be disposed of by the retrying Court in such manner as may be just. Both parties should be at liberty to give fresh evidence.

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GANGADHAR.

*Before Sir Michael Roberts Westropp Kt., C. J. and
Mr. Justice Melvill.*

August 28.

RAGHU AMBU (defendant) Appellant v. GOVIND
BAHIRAV *et al* (plaintiffs) Respondents. *

*Enhancement of rent by one of several Landlords—Objection
raised, but no issue sought.*

One of several tenants-in-common, joint tenants, or co-parceners (unless he is acting by consent of the others as manager of an estate) is not at liberty to enhance rent or eject tenants at his pleasure.

If such an objection is taken in the written statements, but no issue sought on that point in the lower Courts the defendant cannot be allowed to press it for the first time in appeal.

This is a second appeal from the decision of the District Judge of Thana, in Appeal No. 499 of 1878.

The objection now urged before this Court, which is the first in the memorandum of second appeal viz: "That the respondents, being inamdars of a moiety (only) of the village, have no right to increase the assessment on their own share without reference to (*i.e.*, without the authority or concurrence of) their co-sharers," was apparently taken in the written statement of the appellant in defence, but he does not appear to have sought for any issue on that point in either of the Courts below, and he is not even now prepared with an affidavit to the effect that the plaintiff's co-owners have concurred, or would not concur, in the enhancement of the rent insisted upon by the plaintiffs. It has been said for the plaintiffs that there has been a partition between them and the owners of the other moiety of the village sufficient to destroy all right or survivorship between them and their co-owners as members of a Hindu family. That may be so, but it is not pretended that there has been any partition by metes and bounds, and further the

* Appeal No. 229 of 1879 (p. 446 of P. J. 1879.)

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demise to the defendant was anterior to such family partition. Although the plaintiffs and their co-owners may no longer be joint tenants, or Hindu co-parceners, *i. e.*, members of an undivided Hindu family, and the right of survivorship may be destroyed yet they are at the least tenants-in-common, and it has been held both here *Balaji vs. Gopal* (1), and in Calcutta *Guni Mahamad vs. Durga Prashad Mytse* (2), that one of several tenants-in-common, joint tenants, or co-parceners (unless he is acting by consent of the others as manager of an estate) is not at liberty to enhance rent or eject tenants at his pleasure. Therefore, the first objection, taken in the defendant's memorandum of second appeal, would have been valid and effectual if urged at the proper time. Under such circumstances, however, as abovementioned, we cannot allow it to be now pressed for the first time. Although contained in the defendant's written statement, he does not appear to have thought it worth while to bring the attention of either of the Courts below to the point. We must, accordingly, affirm the decree with costs.

August 26.

*Before Sir Michael Roberts Westropp Kt., C. J. and
Mr. Justice Melvill.*

**TARBHOWAN DAYARAM plaintiff. v. JIVA DATAR
et al Defendants.***

Attachment of property of deceased debtor.

If the movable property of a deceased judgment debtor sought to be seized is in the possession of his heirs, the attachment should be made by actual seizure.

This is a reference from the Second Class Subordinate Judge of Khaira in his capacity of Small Cause Court Judge in Darkhast No. 2502 of 1879 under the provisions of Sections 617 of Act X of 1877.

If, as stated in the case, the moveable property of the deceased judgment debtor sought to be seized is in the possession of his heirs, the attachment should be made by actual seizure.

*Sm. C. C. Ref 3 of 1879 (P. 447 of P. J. 1879.)

(1) Ind. L. R. 3 Bom. 23.

(2) Ind L. R. 4 Cal. a Full Bench case.

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*Before Sir Michael Roberts Westropp Kt., C. J. and
Mr. Justice Melvill.*

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September 2.

**MAHADAJI GANESH (plaintiff) Appellant v.
GOVIND GANESH and others (defendants)
Respondents.***

Costs—Partition suit—Mortgagee made party.

Where in a partition suit a mortgagee of a portion of the family property, as to the liability to whom there is a dispute between the original parties, is made a party at the instance of the Court, he will be entitled to all costs of the suit and appeals as against the plaintiff, whose right to compel the original defendants to recoup him in respect thereof will depend on the question whether his share is bound by the mortgage.

This is a second appeal against the decision of the Acting District Judge of Ratnagiri, in appeal No. 170 of 1877.

This is a suit for partition, and the plaintiff's right to a 1/5th share of the family property is not disputed, but the question is whether certain debts were ancestral debts or debts for the benefit of the family at large. If these debts were either ancestral, i. e., debts of the father or grandfather of the plaintiff, not incurred for illegal or immoral purposes, or if they were incurred for the benefit of the plaintiff as well as the rest of the family and are not barred by the law of limitation, the plaintiff can take his 1/5th share only subject to such debts. The fifth defendant being a mortgagee of a portion of the family lands, has, by the Subordinate Judge, been made a defendant, there being a dispute between the plaintiff and the other defendants as to whether the plaintiff is bound by the three mortgages or any of them executed to the fifth defendant by certain of the other defendants. The fifth defendant does not object to having been made a party, but expresses a desire to be paid off, and insists that the shares of all the co-parceners in the mortgaged property are bound by the mortgages.

He (the fifth defendant) has not in anywise provoked the present litigation, and there not being any offer to redeem his mortgage, he, having been brought in as a defendant merely for the convenience of the other parties in this suit, is entitled to be kept harmless as regards costs of the suit

* Appeal No. 156 of 1879 (p. 477 of P. J. 1879.)



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and of the appeals. To those costs he is entitled as against the plaintiff. Whether the plaintiff will be entitled to compel the defendants, other than the fifth defendant, to recoup the plaintiff in respect of those costs to be paid to the fifth defendant depends upon the question whether the plaintiff's share in the land mortgaged to the fifth defendant is bound by the mortgages to that defendant or not. If the plaintiff's share be so bound, he will not be entitled to be so recouped. If it be not so bound, he will be entitled to be recouped by such of the defendants as created those mortgages. The plaintiff is, in this partition suit, entitled as against his coparceners to a decision as to what alleged ancestral or family debts his share is liable jointly with the shares of those coparceners, and such a decision would not bind the fifth defendant if he were not a party to this suit. He not having objected to be made a party, and being apparently the principal alleged creditor of the family, ought, we think, to be continued as a defendant, but protected, as we have above mentioned, in respect of all costs in this suit and of the two appeals, and as regards future costs not improperly occasioned by him. We, therefore reverse the decrees of the Courts below and restore the 5th defendant as a party to the suit and remand the suit for retrial. We direct the Subordinate Judge to proceed to ascertain to which of the alleged ancestral and family debts, including those alleged to be due to the fifth defendant, the plaintiff is liable, and to proceed to award to him his share of the whole of the family property, with due regard to the conclusions at which the Subordinate Judge may arrive as to the plaintiff's liability to the said family and ancestral debts or any of them. Except as to the costs of the fifth defendant hereinbefore provided for, we direct that, on the new trial of this cause, the Subordinate Judge do make such order as to costs of the suit and both appeals as may be just.

September 8.

Before Mr. Justice Melvill and Mr. Justice Kemball.

SHIVLAL GHELA (defendant) Appellant v. JE-
CHAND RAVCHAND (plaintiff) Respondent.*

• Appeal No. 266 of 1879 (P. 482 of P. J. 1879.)

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*Mortgage—Puisne mortgagee's right to redeem after
fore-closure decree—Accounts.*

1879

~~SIR~~
~~VED~~
JACHARD

At the date of the suit brought by the plaintiff against his mortgagor the equity of redemption had been mortgaged to A. by a registered deed. The plaintiff had thus notice of A.'s incumbrance and was bound to make him a party to his suit. *Held*, that A. was entitled to have an opportunity exercising the option of redeeming the plaintiff's mortgage, but he is bound by the account taken between the plaintiff and his mortgagor.

This is a second appeal from the decision of the Assistant Judge of Ahmedabad, in Appeal No. 132 of 1877.

At the date of the suit brought by the plaintiff against his mortgagor, the equity of redemption had been mortgaged to the defendant by a registered instrument. It is probable that the defendant was, at that date, in possession under his mortgage, and, if so, the plaintiff had notice of the defendant's incumbrance, and was bound to make him a party to his suit. But even if that was not the case, we think that the defendant should have an opportunity of exercising the option of redeeming the plaintiff's mortgage, though we hold him bound by the account taken in the suit between the plaintiff and his mortgagor (*Fisher on mortgage s. 1441*). We, therefore, reverse the decree of the Assistant Judge, and in lieu thereof direct that the defendant do pay to the plaintiff, within six months from this date, the sum found to be due to the plaintiff in the decree obtained by him on the 5th October, 1872, in Suit No. 683 of 1872, together with interest on the said sum at six per cent. *per annum* till date of payment ; and that in default of such payment the defendant be for ever foreclosed and the moiety of the field in dispute be made over to the plaintiff, free from all claim on the part of the defendant. Each party to bear his own costs throughout.

Before Mr. Justice Melvill.

September 11.

KRISHNAJI GOVIND (plaintiff) Appellant *v.*
KAMLA JANU *et al* (defendants) Respon-
dents. *

* Appeal No. 241 of 1879 (P. 484 of P. J. 1879.)



1879

Procedure—Alternative case.

**KRISHNAJI
v.
KAMLA.**

Where a plaintiff in a suit to recover rent rests his claim solely on a lease which is not proved he cannot be allowed to fall back on his general title.

This is a second appeal from the decision of the Acting Judge of Ratnagiri, in Appeal No. 298 of 1877.

It is clear from the plaint that the plaintiff sued solely on an alleged lease, to recover rent from the defendant. The Lower Appellate Court, finding that the lease was not proved, rejected the claim, and refused to follow the Court of first instance into an inquiry into the plaintiff's general title, and his right to recover damages from the defendant for use and occupation. I cannot say that the Lower Appellate Court was in error in refusing to consider and decide upon an alternative case, not put forward in the plaint, on the ground that the plaintiff's suit is based solely upon the alleged lease, Exhibit 45, and that this lease is not proved, and without deciding any other question between the parties, this Court confirms the decree of the District Court with costs.

September 16.

Before Mr. Justice Kemball and Mr. Justice Melvill.
**JAMNADAS MANOR Plaintiff v. BAI MULI and
Tulsi Jiva Defendants. ***

Mortgage—Loss of Mortgaged property.

Where the security has been lost through the breach of a contract on the part of the plaintiff (mortgagee) to pay assessment, he is not entitled to proceed against the mortgagor to recover the mortgage money.

This is a reference from the Second Class Subordinate Judge of Kaira, under Section 617 of Act X of 1877.

On the further evidence taken it is clear that the word "salami" meant assessment. The Court, therefore, is of opinion that the security having been lost through the breach of contract on the part of the plaintiff, he is not entitled now to proceed against the mortgagors to recover the mortgage money. It is impossible to hold that the levying of the salami or assessment was an "objection or obstruction" by any other person contemplated by the mortgage-deed.

* Sm. C. C. Reference 2 of 1879 (p. 487 of P. J. 1879).



Before Mr. Justice Kemball and Mr. Justice Melvill.

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BALMUKANDAS RAJARAM (plaintiff) Appellant
v. BAI DIVALI (defendant) Respondent. *

September 15.

Procedure—Plaint, amendment of, in second appeal.

Where a plaintiff has an honest case and has failed by some misapprehension in putting his case properly, it is but right to give him an opportunity of amending his plaint and the suit should be tried on the merits.

This is a second appeal against the decision of the Acting Assistant Judge of the District of Surat, in Appeal No. 68 of 1877.

There can be no doubt that the form of the plaint is wrong, and that the plaintiff ought to have sued on behalf of his father as well as in his own name, and to have required the minors by their guardian to join him in the suit against the trespasser. And, as the case stands at present, we feel it is impossible to rectify the error so as to make a decree in plaintiff's favour. It is clear, on the findings of both the Courts below, that the plaintiff has an honest case, and that he has failed by some mis-apprehension in putting his case properly. We, therefore, think it right to give him an opportunity of amending his plaint, and when this is done, the suit should be tried on the merits. We accordingly vary the decree of the Assistant Judge, by remanding the case to the Court of the Subordinate Judge that the plaint may be amended as above indicated, and that the case may be disposed of on its merits. In making this order, we direct that the plaintiff do bear the costs in both the appeal Courts and that the costs of the suit and of the new trial do abide the final result.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

GOPAL NARAYAN, deceased, his son and heir Shivram

September 22.

(defendant) Appellant v. ATMARAM GANESH

(Plaintiff) Respondent. †

*Hindu Law—Undivided family—Sale in execution of decree
against one Member—Suit by another member for share
in the property sold.*

* Appeal No. 286 of 1879 (P. 488 of P. J. 1879.)

† S. A. No. 278 of 1879 (p. 489 of P. J. 1879.)



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Where a portion of the undivided family property has been sold in execution of a decree against one of the two undivided brothers, the other brother cannot sue for his share thereof without suing for a general partition of the whole property, nor will, in such a suit, be awarded joint possession with the purchaser, where he has set up a false case of separation, while participating in the fruits of the loan on account of which the property has been sold and where his suit for a general partition is not time-barred.

This is a second appeal against the decision of the Acting Judge of the District of Ratnagiri, in Appeal No. 360 of 1877.

In this case, we are of opinion that the decree of the District Court on appeal should be reversed, and that of the Subordinate Judge restored.

The property described in the plaint was attached and sold in execution of a decree obtained by Yeshwant Lakshman Naik against the plaintiff's brother Nilkanth Ganesh Mirasi, and was purchased by the defendant Gopal Narayan Suktanekar. The plaintiff Atmaram Ganesh Mirasi sued to have this sale set aside as to $\frac{1}{2}$ share of this property, and to have his right to the said $\frac{1}{2}$ share declared, on the ground that he and his brother Nilkanth had, for the last 11 years, been separated, and had each separately enjoyed his $\frac{1}{2}$ share of this particular property.

Both the Courts below have found as a fact that plaintiff and his brother were members of a united family, and that the property in the plaint described was not divided. This being so, the claim, as stated in the plaint, falls to the ground. As a member of a united family, the plaintiff is not entitled to recover in this suit a $\frac{1}{2}$ share of the specific property in the plaint described, because it is only a portion of the family property, and the plaintiff had not sued for a general partition, *Katapa Girmalapa vs. Venkatesh Vinayek* (1).

It only remains for us to consider whether we should, in this case, follow the course adopted in the case just cited, and give plaintiff a decree for joint possession with the defendant of the property in suit. In the circumstances of this case, we do not consider it either necessary or right to

(1) I. L. R. 2 Bom., 676.

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do this. In the present case, the plaintiff not only set up a false case, but the Courts below found that he had in fact participated in the fruits of the loan raised by his brother, on account of which the property was sold ; and his suit for a general partition is not time-barred.

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We, therefore, reverse the decree of the District Court and restore that of the Subordinate Court rejecting the claim of the plaintiff, and directing that he bear all costs of this litigation.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

September 30.

GOVIND VISHNU (plaintiff) Appellant v. HARI YESU and others (defendants) Respondents. *

Sale in execution of decree—Lien on property sold.

A purchaser at a Court sale is affected by all valid liens on the property sold whether he had notice of the same or not.

This is a second appeal from the decision of the Judge of Satara, in Appeal No. 29 of 1879.

M. MELVILL, J.—There appears to be some evidence of notice (witnesses Nos. 35 and 37) : but independently of the question of notice, defendant No. 2, Gopala, as purchaser at a Court sale, is affected by all valid liens on the property. The plaintiff has sued to enforce his lien within the period prescribed by law, and he is entitled to the same relief against Gopala and his assignees as he would have been entitled to against his mortgagor Hari. The Court, therefore, amends the decrees of the Courts below by declaring as against all the defendants, that the plaintiff is entitled to possession of the land in dispute until the sum of Rs. 46, due on his mortgage, and the costs of this suit, be paid off. The plaintiff's costs in the Court of first instance to be borne by all the defendants. The costs of appeal and second appeal by defendants 2 and 3, Gopala and Babaji.

R. H. PINHEY, J.—It is clear from the judgment of the Subordinate Court that the land, which originally belonged to defendant No. 1 Hari and his brother, was sold in execution of a decree obtained by defendant No. 2, Gopala, on a money bond, and was purchased by defendant No. 2 Gopa-

* S. A. No. 304 of 1879 (P. 503 of P. J. 1879.)



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1a. When Gopala bought it, it was in possession of one Apa Mahadik, a registered mortgagee, and Gopala paid off Mahadik's mortgage, got possession of the land, and sold it to the 3rd defendant Babaji. Long before the land was put up for sale by Gopala, the plaintiff had advanced, on the security of the same land, the amount of the bond on which he sues. This bond was held proved by the Subordinate Court, and his finding on this point was not objected to by any of the defendants in the District Court. By this bond plaintiff acquired a lien on the land, and this he is entitled to recover from the present holder of the land.

Therefore, the decree of the District Court must be reversed, and the plaintiff be given a decree for Rs. 46 and all costs of litigation against the land in the plaint described, or possession of the said land until the said amount is paid.

October 2.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

SAKHARAMBHAT MORBHAT (plaintiff) Appel-
lant v. RAMA and BHAVANI, sons of CHIMA-
NA PATIL (defendants) Respondents. *

Evidence, secondary—Unregistered deed—Admissions.

S. 65, cl. b of the Evidence Act of 1872 does not apply to a case where the original document is before the Court, and the Court has an opportunity of perusing its contents, but where the original is not before the Court and its contents have to be proved *alivnde*. The admission in writing referred to in clause b can only be admissible as evidence of the contents of the original, when the original is not before the Court, or admissible as evidence of the existence of the original when the original is not produced or its existence denied. Secondary evidence, therefore, of a compulsorily registrable, but unregistered deed in the shape of admissions thereof contained in other deeds is inadmissible to prove the contents of the unregistered deed.

This is a second appeal from the decision of the Joint Judge of the District of Thana at Nasik, in Appeal No. 352 of 1877.

PINHEY, J.—The plaintiff sues to establish his right to 4 fields, purchased by him at an auction-sale, which took place in execution of a decree obtained by one Nanbhat Ware against Bahiru and Rama sons of Mahipati Borade.

* S. A. No. 281 of 1879 (P. 514 of P. J. 1879.)

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The Defendants object to possession of the said fields being given to plaintiff, on the ground that they were mortgaged to their father for Rs. 300 by the aforesaid Bahiru (by the deed No. 8), and until the amount of their mortgage-lien is paid off.

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As the defendants admit that the fields belonged to Bahiru and do not set up any title to the fields greater than that of mortgagees from Bahiru, it rests with them to establish their title to continue to hold the fields, as against Plaintiff, and the terms under which and the time for which (if any) they are so entitled to hold possession.

This being so, the defendants are in this difficulty. They obtained a mortgage of the fields under a written document, and, therefore, they cannot (under Section 91 of the Indian Evidence Act) give any evidence in proof of the terms of the mortgage, except the document itself, unless secondary evidence of the contents of the document is admissible under other provisions of the Evidence Act. Now the defendants' mortgage-bond is inadmissible in evidence under Section 49 of the Registration Act XX of 1866 (the Registration Act applicable to the case); because it is an instrument required by Section 17 to be registered, and has not been registered. It is, however, contended that secondary evidence may, under clause (b) of Section 65 of the Indian Evidence Act, be given of the contents of the mortgage-deed, because the existence of the mortgage-deed is admitted in 2 other documents of even date with the mortgage, executed by the mortgagor. But it seems to me obvious that the provisions of this clause (b) must be intended to apply, not when the original is before the Court and the Court has an opportunity of perusing its contents, but when the original is not before the Court, and its contents, have to be proved *aliunde*. There would be no object in a provision of law declaring that when a document is before the Court (as in this case), its contents may be proved by secondary evidence, if the contents of the original have been proved to be admitted in writing; unless indeed the legislature desired by this clause (b) to do away with the effect of the law for the Registration of Assurances. It is obvious that the chief object of the Registration



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law would be defeated, and the security of titles to property be seriously impaired, if the contention of the defendants were allowed to prevail, and any two parties to a mortgage-deed could secretly incumber property to any amount and prevent the public obtaining information of the transaction by keeping the mortgage-deed unregistered ; but preserving its effect against the property mortgaged (the Registration law notwithstanding) by the simple expedient of the grantor of the deed passing to the grantee a simple note or letter of even date admitting execution of the deed. This cannot be the intention of clause (b). The admission in writing, referred to in clause (b), can only be admissible as evidence of the contents of the original, when the original is not before the Court, or admissible as evidence of the existence of the original when the original is not produced or its existence denied. The effect of the admissions contained in Exhibits 9 and 10 in this case then is only to establish what is obvious on the face of the record, viz., that Bahiru executed to the defendants' father a mortgage-deed, which Section 49 of Act XX of 1866 says shall not affect any property comprised therein, and the contents of which cannot, under Section 91 of the Indian Evidence Act, be proved in any other way.

It only remains then to consider whether the defendants being in possession, they are, by reason of this possession, only entitled to resist the suit of the plaintiff. This question, as it appears to me, must be answered in the negative. The defendants are in possession : but they do not claim to hold the fields as proprietors in their own right, but only as assignees of a limited interest from Bahiru—that is as mortgagees of Bahiru. Admitting Bahiru's original proprietary title, it is incumbent on them to prove the terms on which, and the time for which, they are entitled to hold possession as against plaintiff, who has purchased the right, title and interest of Bahiru. For the reasons stated above, they cannot prove by any legal evidence that they are entitled to retain possession of the property at all : and, therefore, the plaintiff is entitled to a decree in the terms which he desires.

I would reverse the decree of the Joint Judge and restore

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that of the Subordinate Court, and direct the defendants to bear all costs in the Appellate Court and in this Court.

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M. MELVILL, J.—I concur in thinking that the decree of the Joint Judge should be reversed. Assuming (but not deciding) that it might be competent to the defendants to prove their mortgage by means of a written admission on the part of the mortgagor, I think that the few words contained in Exhibits Nos. 9 and 10 are insufficient to prove the fact of a mortgage to the defendants' father of the lands which form the subject of this suit.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

November 18.

SAHEBKHAN MOGALKHAN (defendant) Appellant
v. RAVJI PARASHRAM (plaintiff) Respondent.*

Appeal—Appellate Court, powers of, to vary a decree.

Where a defendant does not object to a part of a decree of the original Court it is not competent to the Appellate Court to vary it in defendant's favour.

This is a second appeal from the decision of the Assistant Judge of the District of Thana in Appeal No. 357 of 1877.

The defendant in this case has all along admitted that the land in the plaint mentioned belonged to Narayan Malhari Mali, and has contended that plaintiff who purchased the land from Govind, the son of Narayan Malhari Mali, is not entitled to recover possession of the land, because before the date of plaintiff's purchase of the land, it had passed by right of survivorship to defendant who had under the provisions of the document, Exhibit No. 7, become with Narayan joint tenant of the land. The right of defendant to continue to hold possession of the land rests then on the document, Exhibit No. 7. We have no hesitation in concurring with the interpretation put upon this document by the Assistant Judge and in holding that no joint tenancy was created under it, and that this document was really nothing more than a lease under which defendant derived possession of the land from Narayan and was liable to be turned out by Narayan. There is no other interpretation of this document which would ensure the fulfilment of all three

S. A. No. 349 of P. 1879 (P. 540 of P. J. 1879.)



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of the conditions under which possession was given to defendant, viz : (1) that if defendant continued in possession he was to give half the produce to Narayan. (2.) If Narayan sold the land he was to give half the purchase money as compensation to defendant, and (3.) If Narayan chose to come and take possession of the land himself he was to give by way of compensation half the profits of the land to defendant and allow defendant the use of certain trees for 9 years from date of the document. We agree then with the Assistant Judge in considering that the document, Exhibit No. 7, was a lease given by Narayan to defendant. Whether the document, although not registered, is admissible or is inadmissible as evidence plaintiff is entitled under either view to recover possession of the land. If the document is admissible in evidence, plaintiff would be entitled to recover possession under its terms, but if it be inadmissible in evidence for want of registration, as the Assistant Judge held and as we also hold, plaintiff is still entitled to recover as the purchaser from Govind, the son of Narayan—whose original title defendant admits, and from whom there is no other legal evidence to show that defendant derived any rights in the land. We are therefore of opinion that the Assistant Judge was right in decreeing to plaintiff possession of the land.

As to the trees which the Assistant Judge decreed should remain in the possession of defendant for 9 years from the date of Exhibit 7, we are of opinion that we must amend the Appellate Court's decree by striking out this portion of it. It is admitted that besides the document Exhibit No. 7. there is no evidence of defendant's right to the trees, and the Subordinate Court had awarded to defendant use of the trees only up to 15th February 1879—a date long passed now and passed at the time the case was disposed of in the District Court. Defendant did not object to this part of the Subordinate Court's decree, and it was not therefore competent to the Appellate Court to vary this portion of it in defendant's favour. We must therefore now award to plaintiff possession of the land and the trees. The decree of the Appellate Court does not correspond with the judgement recorded by the Assistant Judge, or we should have made this amendment by simply



striking out of the decree the words which now appear in the Assistant Judge's Judgment only, viz : " Subject to defendant's sole right to the trees for 9 years from the date of the bond, Exhibit 7. "

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We amend the decree of the District Court thus :—

1. Confirm so much of the decree as awards to plaintiff possession of the land in the plaint mentioned.
2. Reverse so much of the decree as reserves to defendant the use of the trees on the said land.
3. Confirm the decree in so far as it awards to plaintiff Rs. 14-13-10 for 1874 and Rs. 29-11-8 for 1875 and 1876.
4. Declare plaintiff entitled to recover mesne profits from 1877 to date on which he may be put in possession of the land in suit,—the amount of mesne profits to be determined by the Court executing decree.
5. Order the defendant to bear all costs of litigation in all Courts.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

December 15.

WAMAN PANDURANG (defendant No 2) Appellant v.
VISHVANATH SITARAM and Ganesh Balwant
(plaintiffs) Respondents. *

Liability of friend negotiating for a loan.

Where a person acted only in the capacity of a friend introducing the one who had money to lend to the other who wanted money for the purpose of his business and negotiating the loan by one to the other, he is not liable for the loan either as a principal or a security for the debtor.

This is a second appeal from the decision of the Judge of Thana, in Regular Appeal No 529 of 1877.

This action was brought in the Subordinate Court at Pimpalganj in the Thana District by the plaintiffs Vishwanath Sitaram Takle and Ganesh Balwant Takle to recover from the defendants Balkrishna Babaji Phatak and Wamanrav Pandurang Vad Rs. 2,036-4-0 as the balance of money lent to the defendants, with interest.

The plaintiff No 1, Vishwanath Sitaram Takle, joined the second plaintiff in the suit, because the two plaintiffs are

* S. A. 321 of 1879 (P. 560 of P. J. 1879.)



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members of a united Hindu family and equally interested in the result of the suit: but the first plaintiff was a minor when the transactions, which form the subject of this litigation took place, and took no part in them. It will not therefore be necessary to refer to him again until the final order to be made in the suit is arrived at.

For brevity's sake, the case may be considered as between the second plaintiff, by his surname of Takle only—and the two defendants by their surnames of Phatak and Vad only.

The liability of the first defendant Phatak was not denied: but the second defendant Vad altogether denied his liability for the amount claimed, as he had neither borrowed any money from the plaintiff Takle, nor stood security to Takle for the monies borrowed by Phatak. Vad admitted having negotiated the loan given by Takle to Phatak: but nothing more.

The Subordinate Court at Pimpalgauv (D. Temuji J.) found that although both defendants were sued as principals, the examination of the plaintiff Takle showed that the second defendant Vad was really sued as a security only, and holding that no liability was established against Vad, gave a decree against Phatak only for principal, and interest, and costs, and directed Takle to bear the costs of the second defendant Vad.

On appeal, the District Court of Thana (W. M. Coghlan, J.) holding it proved that the second defendant Vad is responsible for the sum claimed as a principal, reversed the decree of the Subordinate Court and awarded the claim as against both the defendants, with costs in the Court of first instance on both the defendants, and with costs in appeal on Vad.

The Second defendant Vad having preferred a second appeal to this Court, the same has been argued before us, and the question that we have to decide is whether there is any evidence on the record from which the District Court could legally deduce a liability against Vad, the appellant in this Court.

The first argument that was addressed to us by the learned Counsel for the appellant (Mr. Telang) was that the District Judge was in error in holding the appellant liable as a principal, because in the examination (Exhibit No. 56) of the plaintiffs' pleader, which is signed by plaintiff him-

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self, it is admitted that Vad was sued as a surety only. But this argument may be swept away and left out of further consideration. Exhibit No. 56 is made up of 2 questions and 2 answers. The first answer represents that although Phatak had the money that is, not that Vad stood security for it, in the technical sense of the word, but that he guaranteed the loan. In the second answer it is stated that before the money was given to Phatak, Vad agreed that if the money were given to Phatak,

that is, not that Vad agreed to be security for the loan : but that he himself agreed to repay it—a condition which is inconsistent with any claim being made by the plaintiff against defendant No. I Phatak. But the contents of Exhibit No. 56 are really unimportant in a suit like this filed in a Mofussil Court, because what we want to know is not what opinion the plaintiff and his pleader entertained about the suit after it was filed : but how the evidence which was produced bears on the issues raised on the pleadings.

Now, if the evidence in this case, on a consideration of which the District Court held the liability of the appellant Vad established, had been wholly or even for the most part oral, probably we should have had to accept the finding of the District Court without questioning its soundness : but only an infinitesimally small portion of the evidence is oral, and what there is is of the smallest possible importance in its bearing on the point we have to consider. Indeed the District Judge who has considered the case with elaborate care shows that it is by a series of letters that he holds the liability of Vad proved. His words are : “ I think that the “ letter No. 6, and indeed the whole correspondence shows “ that Vad and Phatak were acting together, and that they “ induced Takle to believe that he was lending the money to “ both of them.” The District Judge has gone through “ the whole correspondence ” at length in his judgment, and we must do the same, especially as the opinion at which we have arrived, as to what the correspondence proves, differs altogether from that which the District Judge formed.

Before going through each of the letters which we shall have to consider at some length, and in order to facilitate

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the understanding of the drift of our remarks, we had better at once state it as our opinion that the letters show that the loan which Takle gave was given to Phatak alone, and that Vad never at any time received any benefit from and never accepted any liability for it—that Vad merely negotiated between Takle and Phatak, both of whom were his friends—and that there is only one passage in the correspondence (to which we shall refer when we come to it) which is in any way inconsistent with the opinion at which we have arrived, whereas there are several passages which are irreconcilable with any other interpretation.

The first letter to be considered is Exhibit No. 6, a letter from Vad to Takle dated 3rd January, 1876. Of this the District Judge writes :—“ In this letter, Vad reminds Takle that he had, on a former occasion, spoken to him (Vad) about money, that he was not sure whether Takle had spoken in earnest, or by way of a jest, and that, as he did not at the time require money, he had not pursued the subject, but that if Takle was in earnest, he would now take from him any sum which he could lend at interest.

The letter concludes with a sentence, the meaning of which is not very clear, to the effect that if the money were kept for a short time only, it would be placed at Phatak's credit.

There is no other mention of Phatak in this letter. ”

We accept the District Judge's description of the contents of this letter as correct, down to the words “ but that if Takle was in earnest.” The rest of the letter the District Judge has misunderstood. The letter does not say that Vad would now take any sum &c., but that whatever sum Takle had now to lend was now required, and that interest at 6 per cent. (or 8 annas per cent.) would be paid on it. And the rest of the letter has been misinterpreted by the District Judge because he did not understand when one sentence ended and the next began. The letter really says :—“ Perhaps we may even pay an anna or half an anna more interest : but this will be only if the deposit or loan is not a permanent one. The money will be deposited with Phatak.” This is the meaning or explanation of the passage which the District Judge did not consider “ very clear.” It

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is perfectly clear, if rightly read by putting the full stop after and is perfectly idiomatic Marathi.

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This makes the meaning and effect of letter No. 6 quite clear. Takle being a friend of Vad offered the latter a loan. Vad did not want it then and said so : but added that if in the course of a couple of months it was wanted (that is not by himself only, but by any one) he would let Takle know. Afterwards Phatak, another friend of Vad, does want money. So Vad advises Takle of this and tells him the terms on which the money would be accepted. There is not a word in the letter accepting any personal liability on the part of Vad, or inconsistent with the supposition that Vad was introducing two friends of his, one of whom wanted money and the other of whom had money to lend, unless indeed the use of the word which we have translated " we may pay " (an anna or half an anna more) is considered inconsistent with this interpretation. Strictly perhaps it would have been safer and better to repeat the word in this place : but we cannot think the use of alone justifies an interpretation of the correspondence, which is contradicted by the whole of the rest of the correspondence. The District Judge in his judgment goes on to say : — " Very shortly after the despatch of Exhibit No. 6, Vad wrote another letter to Takle which is not on the record. Takle admits having received such a letter but states that he has been unable to find it. "

" Exhibit No. 29 is Takle's answer to this lost letter, in which, doubtless, the sum to be borrowed must have been specified. In Exhibit No. 29 Takle says that he cannot spare a man to take the money to Lasalgaon and asks Vad to send for it at his early convenience. "

Exhibit No. 29 mentions that the letter to which it is an answer was received through the post and words which the District Judge refers to as expressing " asks Vad to send for it " we should prefer to render as asking " Vad to arrange for the money being taken " to Lasalgaon. It should also be noticed that it is admitted that Phatak had a branch firm at Lasalgaon, and that it is not shown that Vad had anything to do with that firm or had any other business at Lasalgaon.



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The District Judge continues :—" Exhibit No. 29 is dated 11th January, 1876. Exhibit No. 5 dated 15th January, 1876 is an answer to Exhibit No. 29 from Phatak to Takle, sent by Vishnu Lakshman Marathe, Phatak's karkun. This letter authorises the bearer Vishnu Lakhman to receive any sum convenient to Takle to lend, and concludes with the remark 'I write this letter at the instance of Wamanrav Vad.' "

" There then follows an endorsement by Vishnu Lakshman acknowledging the receipt of Rs. 5,000 from Takle, and setting forth that he, Vishnu Lakshman, was acting on behalf of both Phatak and Vad. " With reference to this it is only necessary to notice that the karkun Vishnu Lakshman Marathe who wrote this receipt at the foot of the letter, Exhibit No. 5, was not the karkun of Phatak and Vad, but was the karkun of Phatak alone—that he admits that he had no authority to use Vad's name, and only inserted it because Takle insisted on his doing so, and refused to entrust him with the money unless he did enter the name of Vad in the receipt—that he also admits that his master Phatak rebuked him severely for using the name of Vad in the receipt, directly he told his master that he had done so—and that he never told Vad that he had used his name till 4 months later, and that when he did tell Vad all that Vad said was or all right. It has, of course, been urged for plaintiff here that this "all right" of Vad amounted to a ratification by Vad of the karkun's act : but it does not necessarily mean this or amount to this. It may mean, and we think, under the circumstances, did mean merely that what the karkun had done was a matter of indifference to Vad as it was an unauthorized act and therefore could not bind Vad. Vad might very well have been indifferent, and said , if the view of the nature of the transaction under consideration, which we adopt, is the correct one.

The District Judge goes on :—" The next letter in order of time is Exhibit No. 30 from Takle to Vad dated 14th February 1876 ; it sends an account and asks Vad to recover Rs. 798-13-9 from the writer's brother Krishnarav Takle. "



"Exhibit No. 7 is the answer to Exhibit No. 30, and is dated the 17th February 1876. It is from Vad to Takle, and acknowledges the receipt of Rs. 700 from Krishnaray Takle, and requests Takle to debit Phatak's account with that sum, minus one anna for a receipt stamp."

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With reference to this we note that the District Judge has not quite correctly described what Vad says in this letter, Exhibit No. 7, about the disposal of the money which he had received on Takle's account. What Vad says is this :—"This money I have paid to the credit of Phatak's account with you here. Therefore you should debit Phatak with the amount less an anna for the receipt stamp." It is important to note this, because it shows that even then Vad treated Phatak and Phatak alone as having an account with Takle.

It is only necessary to quote further the two next paras of the judgment of the District Judge in which he says :--

"Exhibit No. 32 is a letter dated 7th November 1876 from Takle to Phatak to the effect that he, Takle, had been to Nasik to see Phatak but had not found him, and had therefore communicated with Vad, who had promised to arrange for the payment of the full amount due to Takle. In this letter, Takle states his inability to allow the debt to remain outstanding any longer, and gives notice that he will raise the rate of interest if it be not forthwith liquidated."

"Exhibits Nos. 36 and 37 are letters from Phatak to Takle, dated the 9th November and 7th December 1876, asking for time, and promising to pay the balance due to Takle, in the next 'Jesht.'"

With reference to this, it is only necessary to remark that there is nothing in this statement which necessarily implies that Vad did anything more than might have been expected of a friend of both parties through whom the original loan had been negotiated : whereas the notice contained in the letter No. 32 to Phatak alone that unless he paid up the balance due, he would be charged an increased rate of interest is irreconcilable with the theory that the debt was one for which Vad as well as Phatak was liable.



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There are two other documents on the record, not noticed by the District Judge, which point the same way, viz :—The drafts, Exhibits Nos. 34 and 35, drawn by Takle on Phatak in February 1876, and honoured and paid by Phatak, and there is also in the letter No. 32 a statement by Takle, not noticed by the District Judge, that after Takle had been to Nasik, and failing to see Phatak had met Vad, and asked Vad to arrange for the payment of the money, Rs. 2,000 were paid by Phatak alone.

To sum up then, it appears to us that the facts of the case disclosed by the correspondence are these :—Takle lent 2 sums, one of Rs. 5,000, and the other of Rs. 700, of these the only one which Vad handled was the latter, and this sum was at once paid into Phatak's account with Takle, and in Takle's accounts appears to the debit of Phatak alone. The original loan of Rs. 5,000 was taken for the express purpose of being deposited with Phatak alone. The only payments made, viz., the Rs. 2,000 mentioned in letter No. 32, and the amounts of the hundis Nos. 34 and 35, were paid by Phatak alone. When Takle began to press for the repayment of the balance due to him, it was to Phatak alone that he gave notice that an increased rate of interest would be charged unless the money were at once paid.

Taking these facts, which are undisputed, into consideration with the terms of the letters and correspondence, which I have considered above, we are unable to see that any liability attaches to Vad either as a principal or as a security for Phatak, and we are of opinion that he acted only, as he alleges, in the capacity of a friend of Takle and a friend of Phatak—introducing the one who had money to lend to the other who wanted money for the purposes of his business—and negotiating the loan by one to the other.

We should therefore reverse the decree of the District Court and restore that of the Subordinate Court, and direct the plaintiff Takle to bear all the costs incurred by the defendant Vad in the District Court and in this Court.



Before Mr. Justice Pinhey and Mr. Justice Melvill.
**CHINTAMAN VYANKATESH (Applicant) Appel-
lant v. SITARAM KESHAV (Opponent) Respondent.***

**1879
December 3.**

*Certificate of Administration, necessity for—Act XX of
1864—S. 440 of Act X of 1877—Disputed
adoption.*

Act XX of 1864 is not superseded by Act X of 1877 and therefore the provision in S. 440 of the latter Act does not do away with the necessity for a guardian of a minor in the Bombay Presidency, who wishes to institute a suit on behalf of his ward obtaining a certificate of administration under Act XX of 1864.

Where a minor has been adopted by a Hindu widow who appoints a person guardian of the minor by will, a certificate should not be refused to such person merely because the validity of the adoption may be disputed. On an application for a certificate by such guardian it is unnecessary to consider the question of the validity of the adoption.

This is an appeal against the order of the Judge of Satara in Application No. 6 of 1879 under Act XX of 1864.

By Section 2 of Act XX of 1864 no person shall be entitled to institute or defend any suit connected with the estate of a minor, of which he claims the charge, until he shall have obtained from the District Court a certificate of administration.

By Section 6 of the same Act, if it shall appear that any person claiming a right to have charge of the property of a minor is entitled to such right by virtue of a will or deed, or other instrument in writing, and is willing to undertake the trust, the Court shall grant a certificate of administration to such person.

In Murlidhar and Wasudev, minors, by their guardian and mother Radhabai *vs.* Supdu and Balkrishna (1) it was ruled that Act XX of 1864 is not superseded by Act X of 1877 (the new Code of Civil Procedure), and therefore the provision in Section 440 of the Code does not do away with the necessity for a guardian of a minor in this Presidency, who wishes to institute a suit in behalf of his ward, obtaining a certificate of administration and guardianship under Act XX of 1864.

In this case the applicant Chintaman Vyankatesh Phad-
*Appeal No. 8 of 1879 (P. 566 of P. J. 1879.)

(1) 3 Bom. 149.



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SITARAM.

nis asks for a certificate under Act XX of 1864 to administer the estate of a minor called Trimbak or Dhondo on the ground that he was appointed guardian of the said minor by an instrument in writing (Exhibit 44) executed by his sister Krishnabai, the widow of Anandrav Dhonddev Foujdar, who, it is alleged, adopted the said minor after the death of her husband. The applicant has filed a suit in the First Class Subordinate Court at Satara, as guardian of the said minor, to recover the property to which he is said to be entitled as the adopted son of his said adoptive father. The suit cannot proceed unless applicant's right to a certificate under Act XX of 1864 is recognised by the Court, and it is clear that the applicant is entitled to a certificate under that Act. The District Judge objected to grant such a certificate because he considered that it would be necessary for him to determine the validity of the alleged adoption of the said minor as a condition precedent to his granting a certificate under Act XX of 1864; and he was of opinion that the validity of the adoption should not be disposed of in a miscellaneous enquiry under Act XX of 1864, but should be determined in a regular suit. But it is obvious that the District Judge was in error in so considering; for unless a certificate under Act XX of 1864 be granted, the status of the minor (i. e., whether he is or is not the legally adopted son of Anandrav Dhonddev Foujdar) could not be determined during his minority, and the result of this would be that if his adoption was a good one, he would be kept out of the property of his adoptive father for the next 13 or 14 years. And there is no present necessity for determining or even considering the validity of the adoption. All that is necessary under Act XX of 1864 for the Court to determine is, that under Exhibit 44 applicant is entitled to a certificate in respect of the minor, be he the son of his natural father or his adoptive father. Armed with this certificate, applicant can then file a suit on the suit now pending in the First Class Subordinate Court at Satara, and have the Court determine, as such, that Court, whether the minor is or is not the legally adopted son of Anandrav Dhonddev Foujdar, and, as such, entitled to recover any, and what, property of the said Anandrav Dhonddev Foujdar,

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We refrain from expressing any opinion whatever as to the adoption set forth in the original application ; but we reverse the District Court's order and direct the District Judge to give the applicant Chintaman Vyankatesh Phadnis a certificate under Act XX of 1864 entitling him to administer the estate of the minor Trimbak or Dhondo, described as the adopted son of Anandrav Dhonddev Foujdar.

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v.
SITARAM.

We think we ought not to give any costs, as we have not made an order in the precise terms asked for in the original application, and there are statements in the application which the opponent was bound to challenge whenever he had an opportunity, if his opposition is *bona fide*, and certainly if it should eventually be decided that the minor's alleged adoption is invalid.

The District Judge will give such subsidiary orders in respect of the care of the minor's person and for his maintenance and education as may be necessary under Act XX of 1864.

Before Mr. Justice Sargent and Mr. Justice Melvill.

NATHU VITHOJI (plaintiff) Appellant v. MAHADU and SAHADU GENUJI, minors, by their administratrices their mother THAKU and another (defendants) Respondents.*

1879
December 3.

In the absence of any proof to the contrary, it must be presumed that the property acquired when the brothers were living together was so acquired by means of the family funds.

This is a second appeal from the decision of the Judge of Poona in Appeal No. 43 of 1879.

We think the District Judge was wrong in holding that the property acquired from Thakau was self-acquired. In the absence of any proof to the contrary, it must be presumed that this property, acquired when the brothers Vithu and Sakharam were living together, was so acquired by means of the family funds. The decree must therefore be amended by decreeing partition of this property.

Appellant to have his costs of appeal.

* S. A. No. 343 of 1879 (P. 569 of P. J. 1879.)



1879

December 8.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

KRISHNARAV SHIVAJI *et al* (defendants)
Appellants *v.* GANPATRAV NILKANTH
by his Mukhtyar GANGADHAR BAL-
KRISHNA (plaintiff) Respondent.*

*Limitation—Well—Easement—Adverse possession—
Jangal Kharda.*

Where the plaintiff and defendant held adjoining survey numbers and there was a well on the defendant's number which the plaintiff alleged belonged to both the fields and which he had a right to use for watering his field. *Held* that an admission by the plaintiff that he had not used the well for 15 years was a bar to his claim whether it was regarded as a claim to proprietary right or to an easement.

A *jangal kharda* is a document prepared by the survey or village officers to the preparation of which the parties to the suit are not parties and therefore it is no evidence of title as between them.

This is a second appeal from the decision of the District Judge of Ahmednagar in Appeal No. 44 of 1877.

In the estimated amount of the claim plaintiff describes his suit as one for the use of the water of the well only ; but in the prayer to his plaint he has asked the Court to affirm his right to the well itself, as well as to the use of the water. It may therefore appear doubtful whether we are called on to deal in this case with a claim to immoveable property or with a claim to an easement. Plaintiff holds a field, Survey No. 326, and the defendants hold a field, No. 327, in which there is a well, which plaintiff alleges, belongs to the owners of both fields and which he has a right to use for watering his field. Whether however we have to deal with the proprietary right to the well, or with an easement, which the plaintiff claims over the well ; in defendant's fields, is immaterial, for in either aspect of the case, the plaintiff's claim is barred by the law of limitation, Act IX of 1871.

In his examination in the Subordinate Court, plaintiff's mukhtyar admitted that plaintiff had not used the well for 15 years previous to the suit. If then plaintiff claims a proprietary right to the well, his claim is barred by Article 143 of Schedule 2, because he has discontinued use of the well

* S. A. No. 363 of 1879 (P. 570 of P. J. 1879.)

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for more than 12 years. If, on the other hand, this suit be one to establish a right to an easement, his claim is barred by Article 146 of the same schedule, as the easement ceased to be enjoyed by the plaintiff more than 12 years before suit.

1879.
KRISHNARAY
*
GANPATRAY.

If we had not considered the claim barred, we must still have reversed the District Court's decree, as the Court's judgment rests almost entirely on the contents of the *jangal kharda*, Exhibit No. 15, which was not evidence of plaintiff's title against defendants. It is a document prepared by the survey or village officers, to the preparation of which the parties to the suit are not parties, and prepared perhaps (from what the pleaders of the parties have said in this Court probably) behind their backs. Exhibit 15 might, under some circumstances, perhaps have been corroborative evidence; but alone it is nothing. The District Court did not use it to corroborate the rest of the case; but used the other documents to corroborate it. Without Exhibit 15 the other documents would not prove even *prima facie* any right whatever to the use of the well, as the District Judge evidently saw when he wrote "the other documentary evidence in the case does not bear very clearly on the point now under consideration."

We, therefore, reverse the District Court's decree, and reject the claim with costs.

Before Mr. Justice Pinhey and Mr. Justice Melvill.
MAYARAM UDARAM Plaintiff v. LALBHAI GIR-
DHAR Defendant. *

1879
December 2.

*Limitation—Execution of decree—Act X of 1877 S.
230—Act XV of 1877, Art 179.*

Article 179 of Act XV of 1877 does not apply if the case is provided for by Section 230 of the Code of Civil Procedure. But that section merely provides that a subsequent application shall not be granted, if made 12 years after the date of decree, i. e., after 12 years execution is absolutely barred. The section does not say that any subsequent application shall be granted if made within 12 years. If the question of absolute bar does not arise, then the ordinary limitation period under Article 179 is applicable.

° Civ. Ref. 20 of 1879 (P. 573 of P. J. 1879.)



1879
MAYARAM
v.
LALBHAI.

This is a reference from the Second Class Subordinate Judge of Umrath, under Section 617 of Act X of 1877.

The Court agrees with the opinion of the Subordinate Judge.

Article 179 of Act XV of 1877 does not apply if the case is provided for by Section 230 of the Code of Civil Procedure. But that section merely provides that a subsequent application shall not be granted, if made 12 years after the date of decree, i.e., after 12 years, execution is absolutely barred. The section does not say that any subsequent application shall be granted if made within 12 years. If the question of absolute bar does not arise, then the ordinary limitation period under Article 179 is applicable.

1879
December 2.

Before Mr. Justice Pinhey and Mr. Justice Melvill.
LALDAS GOKALDAS plaintiff v. BHAGWANJI
JUGAJI, deceased, his son and heir Kalaji
Defendant. *

*Limitation—Act XV of 1877, art. 179—S. 230 of Civil
Procedure Code—payment of bhatta.*

Payment of bhatta is not an “applying for execution, or to take some step in aid of execution.”

Article 179 of Act XV of 1877 does not apply if the case is provided for by Section 230 of the Code of Civil Procedure. But that section merely provides that a subsequent application shall not be granted, if made 12 years after the date of decree, i. e., after 12 years, execution is absolutely barred. The section does not say that any subsequent application shall be granted if made within 12 years. If the question of absolute bar does not arise, then the ordinary limitation period under Article 179 is applicable.

This is a Reference from the Judge of the Court of Small Causes at Ahmedabad, under Section 617 of Act X of 1877.

The Small Cause Court Judge is right on both the points raised by him.

(1) Payment of bhatta is not an “applying for execution, or to take some step in aid of execution.” It is in fact not an application at all.

Sm. C. C. Ref. 4 of 1879 (P. 574 of P. J. 1879.)



(2) Article 179 of Act XV of 1877 does not apply if the case is provided for by Section 230 of the Code of Civil Procedure. But that section merely provides that a subsequent application shall not be granted, if made 12 years after the date of decree, i. e., after 12 years, execution is absolutely barred. The section does not say that any subsequent application shall be granted if made within 12 years. If the question of absolute bar does not arise, then the ordinary limitation period under Article 179 is applicable.

1879
LALDAS
v.
BHAGWANJI.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

SUKUR MALIA Appellant v. KASAM JAN
MAHAMAD Respondent. *

1879
December 9.

Limitation—Promissary note on demand.

The limitation period for a suit on a promissary note on demand is shorter under Act XV of 1877 than under Act IX of 1871 inasmuch as the period of 3 years begins now to run from the date of the instrument instead of from the date of the demand.

This is a Reference from the District Judge of Thana, under Section 617 of Act X of 1877.

The Court agree with the District Court in holding that the limitation period for a suit on a promissory note is shorter under the present Act No. XV of 1877 than under Act IX of 1871, in that the period of three years, now necessarily begins to run from the date of the instrument, instead of from the date of the demand by the obligee.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

APPAJIRAV RAMCHANDRA, deceased, his son
and heir MAHADEVRAV, minor, by his guardian
and manager RADHABAI and another Ap-
plicants v. TUSDULA HUSENSHA and
IBRAHIM SHA, BAVA, deceased, his
sons and heirs MIYA JAN and DADA
JAN Opponents. †

1879
December 9.

* Civ. Ref. 25 of 1879 (P. 575 of P. J. 1879.)

† Extra-Application 76 of 1879 (P. 577 of P. J. 1879.)



1879

APPASIRAV

v.

TUSDULA.

Execution of decree—Continuing possession in—Mortgage after satisfaction of prior decree.

A mortgagee who has obtained a decree can obtain an order in execution that he shall be continued in possession of mortgaged property after the satisfaction of a prior decree in execution of which he may be already in possession.

This is an application against the order of the Judge of Satara in Miscellaneous Appeal No. 4 of 1878.

In this case the applicants, having obtained a decree on a mortgage-deed, for Rs. 656-5-11, against the respondents, applied to the Second Class Subordinate Court at Wai for execution of the decree, by being put in possession of the mortgaged property until the amount of the decree is satisfied, in accordance with the terms of the decree. In the last column of the application for execution, the applicants state that they are at present in possession of the same property and enjoy the proceeds under a previously obtained decree against the same defendants and against the same property ; and they ask that the mortgaged property may be continued in their possession in execution of their second decree, after the amount due at the foot of their first decree is fully satisfied.

The application seems simple enough, and it is difficult to understand how the Courts below can have misunderstood the nature of the order to be made in such a case. It is obvious that when the first decree of the applicants is satisfied, the mortgaged property will pass out of their possession unless they get an order from the Court continuing to them the possession in execution of their second decree. Moreover unless such continuing order is made by the Court, it is further obvious that the present applicants are liable to have their rights postponed by some other judgment-creditors of the respondents stepping in and getting the property attached in their own favour.

The Subordinate Court at Wai rejected the application, on the ground that as the applicants admitted that the property against which they sought execution was already in their possession, the Subordinate Judge did not understand from whom possession was to be taken, or how it was to be

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taken, in order that it might be given to the applicants. This order of the Subordinate Court was confirmed by the District Court of Satara on appeal and on the same ground. The District Judge went on to remark that "there is nothing to show a limit to the possession under the first decree spoken of; and how a man can have that given him which he admits he has got already is more than I can see. There is nothing here to show that the property just spoken of will ever leave the plaintiff's possession which he admits he has; and if he does not show this, it is impossible to decree to him possession again of what he has got already."

1879
APPARNA
TUSVLA.

In the last column of the application, the applicants distinctly state that a time will come when their first decree will be satisfied (pahile hukumnamyache karz ada zahale mbanaje), and that from that time they want to hold the property as mortgagees under their second decree and until it is satisfied. If the facts stated in the darkhast are correct, they are undoubtedly entitled to an order such as they ask for.

The orders of the Subordinate Court and of the District Court in this matter must therefore be reversed, and the case remanded for disposal in the manner we have indicated above.

We have had to deal with this application ex parte, because neither of the original judgment-debtors appeared before us. The second of the judgment-debtors Ibrahimsha having died since the order of the District Court was passed the applicants put the names of his two sons Miya Jan and Dada Jan in his place on the record. Dada Jan has not appeared here. Miya Jan has appeared by his Pleader Mr. Pandurang Balibhadra Kirtikar, not to support the orders of the Courts below, but merely to protest against his name being entered in the place of his father, and as one of his father's heirs on the ground that he is not liable as his father's heirs because he has been adopted into another family. Mr. Kirtikar informed us that he was not instructed to support the orders of the Courts below; but merely to object to his client's name appearing on the record. We cannot here summarily determine whether Miya

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APPAJIRAV

TUSDULA.

Jan's name has or has not been properly placed on the record : but we leave this to be determined by the Court of first instance when disposing of the application for execution on its merits. If the Subordinate Court finds that Miya Jan has been put upon the record improperly or unnecessarily, it will award him his costs here and in the Court below. If he has been rightly put upon the record his costs will we have to be borne by himself.

The other costs of this application and the costs of the appeal to the District Court, and the costs in the Court of first instance will abide the result of the original application for execution.

1879

December 9.

Before Mr. Justice Pinhey and Mr. Justice Melvill.
JIVAJI BHIMRAV *et al* (plaintiffs) Appellants v.
BHIMRAV GOVIND and others (defendants)

Respondents. *

Resumption—Service lands—Shetsandi.

Lands granted in *inam* for *Shetsandi* service cannot be resumed merely because such services are no longer required by Government from the holders.

This is a second appeal from the decision of the Judge of Dharwad in Appeal No. 18 of 1876.

Four objections have been taken to the decree of the District Court, viz. :—

(1). Plaintiffs contend that they are each entitled to a four annas share instead of only a one anna, one pie, share as awarded by the District Court.

(2). Plaintiffs claim their shares of the ground at Narendra on which the house of the second defendant Nilawa stands.

Plaintiffs claim their shares of the shed at Mul-
held by the first defendant.

Plaintiffs claim their shares of the shed at Mul-
held by the first defendant.

Plaintiffs claim their shares of the shed at Mul-
held by the first defendant.

Plaintiffs claim their shares of the shed at Mul-
held by the first defendant.

Plaintiffs claim their shares of the shed at Mul-
held by the first defendant.

Plaintiffs claim their shares of the shed at Mul-
held by the first defendant.

* S. A. 241 of 1879 (P. 579 of P. J. 1879.) realpatidar.com



to hold the shed at Mulmutal are findings of fact, with which we cannot interfere ; and as the fields Nos. 17 and 37 were admitted before Baron Larpent to have been granted as inam to the ancestors of the fourth defendant Mulla and to have continued in his family ever since, the plaintiffs cannot now claim to resume possession of them merely because the Shetsandi service for which they were originally granted is no longer required of the holders by Government.

The first objection is undoubtedly a good one. Plaintiffs 1 and 2 and Defendants 1 and 9 represent the four sons of Jivaji, the original head of their branch of the family, between whom the partition deed No. 18 was executed in 1857. According to the terms of that partition deed, each of them is entitled to $\frac{1}{4}$ or a 4 annas share of the family property. The District Judge however remarks concerning this deed, that the plaintiffs " overlook that the partition agreed to in 1857 was amended and modified by the settlement effected by Mr. Stewart Gordon in 1863. The document relating to this is Exhibit No. 19, the writer of which was Hanmant-rav Deshpande : it was also signed by the defendant No. 1 and was produced by the plaintiffs, and in it plaintiffs' names occur as sharers to the extent of one anna, one pie, each. " And this too seems to have been the view taken by the present District Judge, Mr. Sandwith's predecessor, Baron Larpent, and by both the Subordinate Judges before whom this case has been at different times. This is not a little remarkable : for when the yadi No. 19, comes to be carefully compared with the partition deed No. 18, it becomes evident that the former does not modify the latter, but positively confirms it. It is true that in the yad No. 19, the shares of the plaintiffs are shown as one anna and one pie each ; but the shares of the defendants 1 and 9 are also shown as only 1 anna and one pie each. The reason for this is that the yad No. 19 does not deal with the shares of the descendants of Jivaji only, as does the partition deed No. 18, but with the shares of all the members of that family of watandars of which Jiwaji was one. The yad No. 19 shows the nine sharers who own the whole watan, and inasmuch as it shows that the share of each of the plaintiffs and of the 1st and 9th defendants is the same, it confirms the deed No. 18 which states that each of them as representing

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Bhimray.

one of the four sons of Jivaji is entitled to a fourth share of Jivaji's property, i. e., Jivaji's share of the whole watan. When this was pointed out by the Court to the pleader who appeared for some of the defendants, he at once said that this must have been what was meant by the District Judge ; but it is clear that it is neither what the District Judge meant nor what he said, and we must therefore amend this part of his decree.

The second objection raised before us must also be allowed. It was found in the Courts below that the ground at Narendra on which the house of the defendant No. 2, Nilowa, stands is part of the watan land belonging to the plaintiffs and their branch of the family. The house was not built with the plaintiff's consent. It has not stood long enough to give Nilowa a prescriptive right to the site against the owners of the site. And no ground whatever has been shown to warrant the Courts in refusing the plaintiffs their shares in this property.

We must, therefore, amend the decree of the District Court by awarding to each of the plaintiffs a $\frac{1}{4}$ share in the property in which the District Court awarded each of them a one anna one pie share, and also by further awarding to each of the plaintiffs a $\frac{1}{4}$ share of the ground at Narendra occupied by the house of the second defendant Nilowa.

In the matter of costs, we order that the plaintiffs bear all the costs incurred in all Courts up to the time of the suit being received back in the First Class Subordinate Judge's Court in compliance with the decree of this Court in Special Appeal No. 354 of 1873, except the cost of the stamp used for the plaint, which being amended in the plaint on which this decree is based.

As to costs subsequent to the receipt of the case on remand in the Subordinate Court, we order the plaintiffs to bear the costs of the defendants 3 and 4 whose defences have succeeded ; and we order the plaintiffs to recover their costs and also the cost of the stamp on the plaint from the 1st defendant by whom (and not by defendant No. 9) their claim was disputed ; and all other costs (if any) we order are to be borne by the party or parties by whom they were incurred,

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1880.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

VENKATRAV SADASHIV (Defendant No. 2) Appellant v. GUNDO RAJIRAV (plaintiff) Respondent. *

1880
January 5.

Mortgage—Merger.

A first mortgage is not extinguished by a second mortgage of the same property to the same mortgagee. Goluknath v. Lallu Prem Lal (3 Cal. 307) generally concurred in

This is a second appeal from the decision of the Judge of Dharwar, in Appeal No, 90 of 1878.

The respondent's pleader does not attempt to support the decisions of the Courts below on the ground on which they have rested those decisions, viz., that the first mortgage (Exhibit 28) to the appellant (defendant No. 2) was wholly extinguished, and rendered inoperative, by the second mortgage (Exhibit 29). On this point we may refer to the decision of the Calcutta High Court in Goluknath Misser vs. Lallu Prem Lal (1) in which we generally concur. The respondent's pleader admits that the plaintiff is bound to pay any money which may be due to the appellant, by virtue of the mortgage Exhibit 28, and the appellant's pleader admits that this is all to which his client is entitled, and that he cannot claim any benefit, as against the respondent, from the second mortgage, Exhibit 29. We, accordingly, by consent of parties, amend the decrees of the Courts below, by adding thereto a declaration that the appellant is entitled, before he surrenders the land, or if the land be sold, then out of the proceeds of the sale, to receive any amount which may be due to him on account of the sum of Rs. 150, admitted in Exhibit 29 to be due under Exhibit 28 at the date of Exhibit 29 together with interest thereon at 9 per cent. per annum, after debiting the appellant with the value of all produce received by him since the date of Exhibit 29 upto the

* Appeal No. 342 of 1879 (P. 3 of P. J. 1880.)

(1) I. L. R., 3 Cal. 307.



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1880
VENKATRAY
GUNDO. date of taking the account. The account to be taken in execution of the decree. The respondent to bear the appellant's costs in appeal and second appeal.

1880
January 6.

Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

GOPAL YADNESHVAR by his agent **KESHAV YADNESHVAR** Plaintiff *v.* **POSU BHAU** and Others Defendants. *

Procedure—Residence of person on pilgrimage.

A person who has gone to Benares on a temporary pilgrimage cannot, in the absence of other relevant circumstances, be held to be "non-resident" at the place where he has his permanent home.

This is a reference from the Assistant Judge of Thana, under Section 617 of Act X of 1877.

The Court is of opinion that a person who has gone to Benares on a temporary pilgrimage cannot, in the absence of other relevant circumstances, be held to be "not resident" at the place where he has his permanent home.

1880
January 5.

Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

KUSSONDAS PRANVALABHDAS Plaintiff *v.* **VANMALEE KUSSON** Defendant. †

Execution of decree—Attachment—Bailiff's duty.

A bailiff is not bound to attach property, merely because it is pointed out by the decree-holder, if he sees good reason to believe that it does not belong to the judgment-debtor, but if there is no sufficient reason to doubt that it is the property of the debtor, he should attach it and leave the claimants to come forward and establish their right.

This is a reference from the Subordinate Judge of Balsar, under Section 617 of Act X of 1877.

The Court is not prepared to express any opinion on such

* Civ. Ref. No. 29 of 1879 (P. 5 of P. J. 1880.)

† Civ. Ref. No. 22 of 1879 (P. 8 of P. J. 1880.

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abstract questions as are referred by the Subordinate Judge. Many difficult points of law may arise in regard to the attachment of property, and every case must be decided on its own merits. The circumstances of the present case appear to present little difficulty. The house to which the bailiff went was the house of the judgment-debtor : it was not necessary to force the outer door : and the bailiff ought not to have been deterred by the opposition of the judgement-debtor's son from forcing his way into the house. When inside the house, he should have exercised his direction in regard to the attachment of property pointed out by the decree-holder. A bailiff is not bound to attach property, merely because it is pointed out by the decree-holder, if he sees good reason to believe that it does not belong to the judgement-debtor, but if there is no sufficient reason to doubt that it is the property of the debtor, he should attach it, and leave claimants to come forward and establish their right. In the present case, the house is said to have been the house of the judgement-debtor, and, presumably, what it contained belonged to him, or was liable for his debts. It would appear, therefore, that the bailiff ought to have forced his way in, and attached the property pointed out to him and if the judgment-debtors's son prevented him from entering the house, the son might have been criminally prosecuted.

1880

KUSUMDAS
v.
VAMNABHAI

Before Mr. Justice Pinhey and Mr. Justice Melvill.

1880

NARSU JAGOJI (defendant 2) Appellant v. RA-
GHUNATH BALKRISHNA (plaintiff)
Respondent. *

January 19.

Mortgage without possession—Purchaser at execution sale.

A mortgage under unregistered document and without possession will not avail against a purchaser at an execution sale whose title has been perfected by transfer of possession.

This is a second appeal from the decision of the Judge of the District of Satara, in appeal No. 38 of 1879.

The appellant and 2nd defendant Narsu Jagoji Ghorpade having bought at an auction sale the right, title and interest of Andu, Babaji, Kundlika and their surety Apa in certain

• Appeal No. 421 of 1879 (P. 12 of P. J. 1880.)



1880
Narsu
Rasnaray.

fields, which were sold in execution of a decree obtained against these 4 persons by one Krishna Sadashiv, the plaintiff has brought this action against Apa and the appellant Narsu on 3 bonds for Rs. 99 each to recover Rs. 360 being principal and interest due on these 3 bonds, or to obtain an order that the land purchased by the appellant and mortgaged by the 3 bonds to the plaintiff may be put in his possession until the aforesaid amount is paid.

The decree passed in the case by the Subordinate Court at Vai in the terms of the plaint has been confirmed by the District Court and the 2nd defendant Narsu has appealed to this Court ; and the grounds on which it is contended that we should set aside the decrees of the Courts below are :—

1. The 3 bonds on which the plaintiff has sued being of even date form parts of one transaction, and should, therefore, have been registered, if they are to effect a valid mortgage against the property in the plaint described.

2. As the 3 bonds were executed by Apa alone, and Narsu at the auction sale purchased the right, title, and interest of 3 other persons besides Apa, it is necessary that the Court should determine what were the rights of Apa and what the rights of the other judgment-debtors in the property purchased by Narsu.

3. As plaintiff is a mortgagee under unregistered documents and without possession, his title as such will not avail against the purchase of Narsu which has been perfected by transfer of possession.

We express no opinion on the 1st and 2nd points, because the 3rd objection is, in our opinion, fatal to the claim as against Narsu and the property in his possession. We need not do more on this point than refer to the decisions of this Court in Gopal Joitaram Keskar *vs*, Krishnapa Mahadapa (1) and Hari Ramchandra *vs*. Mahadaji Vishnu (2). The point of law is distinctly decided in both those cases, and in the judgments therein it is shown that this point has been con-

(1) 7 Bom. H. C. Rep. A. C. J. 60.

(2) 8 Bom. H. C. Rep. A. C. J. 50.



sistently determined the same way by this Court and the late Sadar Court during a long course of years.

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We must, therefore, reverse the decrees of both the District Court and Subordinate Court so far as they award plaintiff's claim against the appellant and 2nd defendant Narsu or the land in his possession.

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v.
RAGHUNATH.

The plaintiff must bear the costs incurred by Narsu in all Courts.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

1880

VISHNOO ABAJI (defendant) Appellant v. RAM-KRISHNARAO NARAYAN (plaintiff) Respondent. *

January 21.

Parties to suit—Objection not taken in Courts below.

Where a plaintiff does not object in the Courts below to a third person being made a party, he will not be allowed to do so in second appeal.

This is a second appeal from the decision of the District Judge of Satara in Appeal No. 164 of 1878.

We consider in this case that the District Judge was in error in holding that appellant Vishnoo has no proper place as defendant and should not have been allowed to come in : and that he should have decided the appeal on its merits. The question of title had been distinctly raised by the defendants 3 and 4 ; the fact of Vishnoo being joined as a defendant did not, therefore, alter the whole nature of the suit. And it has been pointed out to us that plaintiffs did not in the Court of the Subordinate Judge take any objection to Vishnoo being joined, and we do not consider, therefore, that the objection should now be allowed.

We, therefore, reverse the decree of the District Judge and remand the case for decision on its merits. Costs in this appeal to be costs in the suit.

* • Appeal No. 414 of 1879 (P. 13 of P. J 1880.)

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January 12.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

CHINTO ANANT Applicant *v.* NAGESH BHAT, deceased, by his sons TATYA and BALYA, minors by their mother RAKHMABAI Opponents. *

Certificate of Administration—Act XX of 1864.

Where a District Judge reversed the decree of the Subordinate Judge on the ground that the mother of the minor defendants had not obtained a certificate to administer the estate of her minor sons under Act XX of 1864, the High Court reversed his decree as made without jurisdiction.

This is an application against the order of the District Judge of Belgaum in Appeal No. 128 of 1878.

This is what may for brevity's sake be called a Small Cause suit, and was disposed of by the 1st Class Subordinate Court at Belgaum, the Judge of which has Small Cause Court powers. The Subordinate Court awarded the plaintiff Rs. 256-12-10, and interest thereon at 9 p. c. per annum from 1st January 1876 to date of decree.

When the suit was filed, the original defendant Nagesh Bhat, Pundlic Bhat was alive ; but he died before the Subordinate Court passed its decree, and his two minor sons Tatya and Balya were made defendants in his place by their mother and guardian Rakhmabai.

On appeal to the District Court of Belgaum the decree of the Subordinate Court was reversed, and the claim of plaintiff rejected, because Rakhmabai had not received any certificate to administer the estate of the minor defendants under Act XX of 1864.

It is clear that the decree of the District Court was made without jurisdiction, and must be reversed. The pleader who appears to show cause against the rule nisi granted on the 14th August, 1879, admits this, and it is not, therefore, necessary to say more on this point.

If the District Court had disposed of the appeal on a consideration of its merits, we should have to consider what the merits of the case were, and if necessary to order the final disposal of the case to be postponed until Rakhmabai had

◊ Extra. Application No. 90 of 1879 (P. 15 of P. J. 1880.)

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obtained a certificate under Act XX of 1864, enabling her to defend the rights of her minor sons. But as the District Court decided the appeal on a purely technical point, and it appears that Nagesh Bhat died after all the evidence had been taken by the Subordinate Court it is only necessary for us to order that the rule nisi granted by this Court on 14th August 1879 be made absolute—That the decree of the District Court be reversed—and that the decree of the Subordinate Court be restored.

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CHINTO
v.
NAGESH BHAT.

As the point taken here was not taken in the District Court, where, if taken, it might have been allowed, we make the rule absolute without awarding to either party any costs incurred subsequent to the date of the Subordinate Court's decree.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

GANPATRAO JAGANNATH Applicant v. RAM-
RAO HANMANT Opponent. *

1880
January 12.

Security for costs—Pauper Appeal.

Security for costs may be demanded from a pauper appellant but the mere fact of his pauperism is not a sufficient ground for doing so.

The plaintiff Ramrao Hanmant Rajguru having sued defendants Ganpatrao Jagannath and 2 others in forma pauperis in the Court of the 1st Class Subordinate Judge of Satara and his claim having been dismissed by that Court, he has filed an appeal in forma pauperis in this Court No. 18 of 1879.

On notices of the appeal being served on the defendants and respondents, the 1st defendant, Ganpatrao Jagannath applied to this Court under Sec. 549 of the Code of Civil Procedure to demand from the appellant security for costs of the appeal and of the original suit, on the ground that appellant being a pauper, the respondent will have no means to recover the large costs incurred in the suit and appeal in the event of the decree of the lower Court being confirmed.

On the 18th December, 1879, a rule nisi to show cause

* Civ. Ap. No. 193 of 1879 (p. 16 of P. J. 1880.)



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GANPATRAO
v.
RAMRAO.

why this application should not be granted was ordered by this Division Bench to issue to the plaintiff. Both parties have appeared before us this day by pleader and the rule has been argued.

The First argument urged for the plaintiff in showing cause against the rule is that Section 549 of the Code of Civil Procedure does not apply to a pauper appeal. There is nothing in the wording of the section which supports this argument and no decision was cited in support of it. In *Nasirudin Briwas (petitioner) vs. Ujal Briwas and others* (1) it was ruled by Couch C. J., and Dwarkanath Mittar, J., that Section 342 of Act VIII of 1859 which corresponds to Section 549 of the new Code was not applicable to appeals in forma pauperis ; but this is the only decision that I know of to this effect. The substance of it was not embodied in the new Code and I am not prepared to go so far as this ; because it appears to me that to say that Section 549 of the Code of Civil Procedure does not apply to pauper appeals would be equivalent to adding a second proviso to Sec. 549 which the legislature has not considered it necessary to add to that section ; although the decision in *Nasirudin Briwas vs. Ujal Briwas and others* was delivered on 20th May 1872 was published, and was presumably known to the legislature. I am not prepared to hold that in all circumstances, the Appellate Court is bound to refuse to demand security for costs from a pauper appellant. This too appears to have been the opinion held and acted on by Markby, J., in the matter of *Jogundoo Deb Roykut Pet vs. Funindro Deb Roykut* (2).

But when I come to consider whether the present is a case in which security for costs should be taken from appellant, I arrive at the conclusion that it is not. The sole ground on which we are asked to demand security from appellant is his pauperism. If, therefore, on this ground alone we were to order appellant to furnish security for costs, we ought equally to call on every pauper appellant to give security for costs ; and to do this would

(1) 17 W. R. 68.

(2) 18 W. R. 102.



be practically to do the very thing which makes me object to the decision in *Nasirudin Briwas vs. Ujal Briwas and others*, viz., to add a proviso to Section 549 of the Code of Civil Procedure.

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GANPATRAO
v.
RAMBAO.

In this view of the present application, I consider that the rule nisi should be discharged ; but I would not discharge with costs. I would direct costs of this application to be costs in this case and to allow the result.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

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UMASHANKAR NAGESHVAR Applicant v. BAHADUR BHILA and others Opponents. *

January 26.

*Appeal—Rejection of plaint—Civ. Pro. Code, S. 53,
Cl. f.—First hearing.*

Where a Subordinate Judge, after the framing of issues, rejected a plaint under S. 53 f. of Act X of 1877, by an order passed before Act XII of 1879 came into force and embodied the order in a formal decree, *Pinhey J. held* that an appeal lay (*Melvill, J. dissenting.*)

Where the subordinate Judge framed issues, one of which was to the effect that whether there had been a misjoinder of parties and causes of action, and adjourned the case to a further date for hearing this issue, *Pinhey, J. held Melvill, J. dissenting*) that the hearing on such adjourned date was not the first hearing.

This is an application against the order of the Judge of Khandesh at Dhulia. in Appeal No. 68 of 1878.

R. H. PINHEY, J.—The plaintiff filed a suit against the four defendants in the 2nd Class Subordinate Court at Nandurbar in the Khandesh District to recover Rs. 616 from certain mortgaged property in the plaint described, and any sum not so realized from the defendants personally.

The 1st and 2nd defendants filed a joint written statement and each of the 3rd and 4th defendants filed a separate written statement.

On the 22nd Februry, 1878, the Subordinate Judge (Mr. Nanawati) framed seven issues for decision, the first of which was :—

1. Is or is not there a misjoinder of parties in this suit :

* Extra. Application No. 105 of 1879 (P. 18 of P. J. 1880.)



1880 and has or has not the plaintiff joined causes of action, which
UMASHANKAR ought not to have been joined ?

BAHADUR.

It is not necessary for the purpose of this judgment to state the other issues. After framing the aforesaid seven issues, the Subordinate Judge postponed the further hearing of the case.

On the 1st March, 1878, the case was again called on before the Subordinate Judge for hearing the issues of law framed in the case ; and the Subordinate Judge found on the 1st issue that there had been a misjoinder of parties and of causes of action, and as the plaintiff would not amend the plaint, the Subordinate Judge made an order that the plaint stand rejected under Section 53 (f) of the Code of Civil Procedure. The Subordinate Judge did not, however, merely endorse this order of rejection on the plaint, but he embodied the order in a formal decree, drawn up in the manner prescribed by Sections 205 and 206 of the Code of Civil Procedure, duly sealed with the seal of the Court.

There are no reasons recorded by the Subordinate Judge showing why he considered it necessary to embody his order in the form of a decree, instead of simply endorsing the order of rejection on the plaint. Apparently his reason was this. The order was not made " at or before the first hearing " of the suit as required by Section 53 of the Code of Civil Procedure, but at the postponed hearing of the suit, and after the Court had framed and recorded issues both of law and fact under Section 146 of the Code: and as the Subordinate Judge determined the 1st issue, which was one of law under Section 154, he seems to have considered that he was bound to make a decree in the terms of his judgment on the first issue.

The plaintiff then presented an appeal to the District Court of Khandesh ; but that Court (Cordeaux, Judge) rejected the appeal on the ground that no appeal lay to the District Court from an order by a Subordinate Court rejecting a plaint under Section 53 (f) of the Code of Civil Procedure. This order of the District Court was made on the 20th June, 1879, that is, before the passing of Act XII of 1879, which

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amended the Code of Civil Procedure and by Section 2 declared an order rejecting a plaint to be within the definition of a decree.

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v.
BAHADUR.

An application was then made by the plaintiff to this Court, asking the Court in the exercise of its extraordinary jurisdiction to reverse both or either of the orders of the Courts below, as the ends of justice may seem to require, and to direct enquiry into the claim on its merits. On the 2nd October, 1879, a Division Bench composed of Kemball and F. D. Melvill, JJ., granted a *rule nisi* to show cause why the orders of both the lower Courts should not be set aside, and the rule has now been argued before us.

In my opinion, the proper order for us to make is to make the rule absolute to the extent of reversing the order of the District Court, and directing the District Court to hear and dispose of the appeal. Unquestionably an appeal lay to the District Court from a decree of the Subordinate Court in such a case under Sections 205 and 206 of the Code of Civil Procedure, and the Subordinate Court did, in fact, make such a decree in this case. I care not to enquire, because I need not at this stage of the case determine, whether the decree of the Subordinate Court is right or wrong, or whether the Subordinate Court should or should not have made a decree; but as the Subordinate Court did make a decree, I hold that the District Court was bound to receive the appeal, and decide whether the decree was right or wrong, either in form or substance. If the decree is in the opinion of the District Court right in form and in substance, it is the duty of the District Court to confirm it. If, on the other hand, the decree is wrong in form or substance, or both—wrong in law—it is the duty of the District Court to reverse it. If this be the view of the District Court the District Court will necessarily remand the case to the Subordinate Court; and, further, if the District Court reversed the decree and remand the case on the ground that no decree should have been made under Sections 205 and 206 of the code, then the Subordinate Court will have to make an order on the plaint under Section 53 (f) of the Code, and appeal will now lie from such order to the District Court under the Civil Procedure Code as amended by Act XII of 1879.



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U. MASHANKAR
v.
BANADUR.

Since I wrote the above, my brother Melvill has kindly let me see the judgment which he has written in this case so far as we have heard it argued ; but I am unable to concur with him in either of the conclusions at which he has arrived. I differ from him as to what is the first hearing of a case under the Code of Civil Procedure, and I differ from him as to how a case should and must be disposed of after the issues are framed, and the hearing of the case adjourned.

By the first hearing of a case I understand the day on which the parties are first brought together before the Court and the issues are framed. I further think the first hearing includes all that is done in the case on the same day, or in continuation of the proceedings of that day without adjournment of the case. For instance, I do not consider the first hearing is terminated by the Court adjourning that the Judges and the Bar may take lunch ; nor if the first hearing goes on till the rising of the Court for the day do I consider it terminated by the Judges and Bar proceeding to take their dinner or the night's rest which renders further hearing of the case possible, if the case goes on again when the Court sits again the next day. But, I consider the 1st hearing terminates whenever the Court postpones the case either for evidence or to allow of the pleaders to prepare arguments, and proceeds with another case. Whenever a case so postponed comes before the Court again, I am of opinion that the adjourned hearing cannot be considered the first hearing. In the case before us, I consider the first hearing began and ended on the 22nd February, 1878, and that what was done by the Court in the case on the 1st March following was not done at the first hearing.

Then, as to the way in which a case that has been adjourned after the trial has commenced must be disposed of. In my opinion, a case at this stage can be legally and regularly disposed of in one of two ways, viz., either the plaintiff may withdraw from the suit, or the Court must make a decree—unless the case is struck out because the parties do not appear. The Civil Procedure Code does not, in my opinion, recognise any third way of disposing of a contested suit in which the parties appear after the issues are framed. Nor,

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in my opinion did the old Procedure Code of 1859 differ in this respect from the present Code ; although I am aware that there are cases disposed of under the old Code which may be cited in which Judges allowed plaints to be returned after the issues were framed. I know of no case, however, in which an order for the return of a plaint after framing of issues was made after the point was argued and considered, whether such an order at that stage of the case was in conformity with the Code of Civil Procedure or not. In this case, therefore, I am of opinion that the decree which the Subordinate Court drew up and signed in this case was rightly drawn up and signed, and that an appeal lay from it to the District Court.

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BAHADUR.

As we differ in this case as to the order which should be made in it one of two courses must be taken. Either we must treat it as an appeal (although it is not an appeal, but an application to the Court to exercise its extraordinary jurisdiction) and refer it to a third Judge ; or we may agree that the *rule nisi* be discharged, on the ground that this is not a case for the exercise of our extraordinary jurisdiction, as the plaintiff is not precluded from suing *de novo* (Section 56 of the Code of Civil Procedure). I am ready to acquiesce in either course.

Having further considered the case, we determine that the rule should be discharged, as plaintiff has his remedy under Section 56 of the Code.

As we are not agreed on the grounds on which we have disposed of the case, we think that the rule should be discharged without costs.

F. D. MELVILL, J.—The points that have been argued up to the present time before us are, whether an appeal did lie to the District Judge against the order (or decree) of the Subordinate Judge, rejecting the plaint under section 53 (r) of the Civil Procedure Code, and whether the Subordinate Judge could legally pass the order under the above section at that time when he did pass it. The decision on the first point must, it seems to me, depend on that on the second point. It is true that the Subordinate Judge, possibly without proper reason, drew up a document which is called a de-

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BAHADUR.

-cree, and drew it up in the regular form of a decree. But if the order were properly passed under Section 53 (f), I should not be inclined to hold that an appeal would lie merely because a decree had been added to the order. By the definition in Section 2 of the Code, a decree means the formal order of the Court in which the result of a decision of the suit or other judicial proceeding is embodied. An order rejecting a plaint is an order in a judicial proceeding, and such an order when passed under Section 53 (f) is not appealable. The mere embodiment of that order in a formal order of the Court could not, in my opinion, give a right of appeal within the meaning of Section 540. The real question, therefore, seems to be whether the order rejecting the plaint could have been legally passed under Section 53 (f), and the determination of it turns on the meaning of the words "the first hearing" used in that section.

The facts of the case, so far as they are necessary for the present issue, are these. The plaintiff sued to recover money due, from certain property which had been mortgaged to him and defendant No. 3 by defendants 1 and 2, but claimed only the share which he alleged was due to him. February 22nd, 1878, was fixed as the first day of hearing. Defendants 1 and 2 replied that plaintiff had no right to sue for his own share alone, as the debt (which they pleaded had been satisfied) was originally due to him and to defendant No. 3. Defendant No. 3 replied that plaintiff should have asked him to join in the suit as co-plaintiff. Defendant No. 4 to whom, according to plaintiff's allegation, No. 3 had made over the mortgaged property, also denied plaintiff's right to sue alone. The Subordinate Judge laid down certain issues, the first of which was whether there was a misjoinder of parties in the suit, and whether plaintiff had joined causes of action which ought not to have been joined. He then adjourned the case to the 1st march for hearing the issues of law, when he decided the above issue against the plaintiff, and as plaintiff refused to amend his plaint, he rejected it under Section 53 (f). The question then is whether the hearing of the 1st March can be looked upon as the first hearing within the meaning of that section.

Considerable stress has been laid by Mr. Nanabhai, who

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appeared in support of the rule nisi which had been granted, on Section 34 of the Code, which declares that an objection for want or misjoinder of parties shall be taken before the first hearing, and any such objection not so taken shall be deemed to be waived by the defendant, and it was argued that this was in order to enable the Court to comply with the provisions of Section 53 and decide, if necessary, such objection on the first day of hearing. But this argument does not seem to apply to the present case, because that section does not refer to a joinder in one suit of different causes of action which should not be so joined. It seems to me that in the present case, when the fact of the wrong joinder of causes of action was brought to light by the pleadings of the parties, the Subordinate Judge was bound to lay down the first issue as he did. If he had decided it then and there it could not have been argued that he would not have been justified in passing an order under Section 53 (f), for the order would undoubtedly have been passed at the first hearing. Does then the mere fact of his having adjourned the hearing to another day, (and it can in my opinion make no difference whether the adjournment was for one day or for more), deprive that adjourned hearing of its character as a first hearing, so as to prevent the Court from passing an order under Section 53 ? There is nothing to show, so far as has been pointed out to us, why the adjournment was made, but we must assume, that for good and sufficient reasons the Subordinate Judge was not able to proceed with the case, hear the arguments and pass his order on the first day. And there being such reasons, it seems to me that it would be an unreasonable construction of the law, which would take away from a Court a power which it could have exercised, except for reasons beyond its control. It might be physically impossible for a Judge to do as Section 146 requires in any particular case, that is, frame and record the issues at the first hearing, (if by that is meant the first day of hearing), but it could not be argued that if such a case were unavoidably adjourned to another day, the issues could not then be framed and recorded. In such a case it would be necessary, under the circumstances, to hold that the first hearing included all the days that were necessarily taken up

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UMASHANKAR
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in carrying out the provisions of the law. And if so in that case, why not in the present case? When the Subordinate Judge came to consider the case as shown by the plaint and the written statements &c., he found that there was apparently a mis-joinder of parties and of causes of action. The fact would of course, be disputed by the plaintiff, and it was, therefore, right to lay down an issue on the subject. That issue would probably require argument, and it was for this apparently that the hearing was adjourned to the 1st March. We must assume that the adjournment was necessary in order to enable the Judge to decide the points, but the necessity for the adjournment cannot change the nature of the hearing, so far as the issue is concerned. I must hold that the only reasonable construction to give to the wording of the law is that the first hearing includes any adjournment that may be absolutely necessary in order that the provisions of the law may be carried out, and that it would be unreasonable to read the words "first hearing" as meaning the first day of hearing, and that alone.

I am, therefore, of opinion that the Subordinate Judge had power by law to reject the plaint under Section 53 (j) on the 1st March; and for the reasons above stated, I also hold that no appeal will lie against the order merely because it was formally embodied in a decree.

1880
January 22.

Before Mr. Justice Pinhey and Mr. Justice Melvill.
DAYABHAI JAVHER (plaintiff) Appellant v. BAI
AMBA widow of JETHA BAJI, et al (defendants)
Respondents. *

*Evidence, Objection as to admissibility of—Document
can be proved by the writer.*

Bonds admitted in evidence without objection on the other side can. not be held to be inadmissible by the Appellate Court. They can be legally proved by the evidence of the writer if his evidence satisfy the Court.

This is a second appeal from the decision of the acting Judge of Ahmedabad, in appeal No. 30 of 1877.

The acting Judge is wrong in holding that the bonds are

° S. A. 303 of 1879 (P. 22 of P. J. 1880.)



inadmissible in evidence. They have been admitted in evidence without objection on the other side. The only question for the District Court to decide is whether these bonds are proved, and, if so, whether the additional evidence now on the record justifies the District Court in reversing the well considered judgment of the Subordinate Court, dated 16th January, 1877. We must, however, record it as our opinion that the Acting Judge is in error in considering that the bonds cannot legally be proved by the evidence of the writer of the bonds, if his evidence satisfy the Court. The decree of the District Court must be reversed, and the appeal sent back for disposal by the District Judge. In disposing of the case, the District Court will have to consider whether the re-marriage of the second defendant has any, and what, effect on her liability in this suit.

Costs to follow the final decision.

Before Mr. Justice Sargent and Mr. Justice Melvill.
GOPALDAS JIVANDAS (defendant) Appellant v.
SHRINIVAS SWAMIRAV (plaintiff) Respondent. *

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DAYARRAI
v.
BAI AMBA.

1880
January 26.

Execution of decree—Obstructor liable for damages.

The defendant obstructed the plaintiff in the execution of a decree by the latter by representing that he was in possession of the property against which execution was sought. *Held* that the defendant made himself liable, in the event of his turning out to be a trespasser, to recoup the plaintiff for everything which he might have recovered from the property.

This is an appeal from the decision of the First Class Subordinate Judge of Belgaum, in original Suit No. 62 of 1876.

We think that the Subordinate Judge had materials, although doubtless slight ones, for determining the damage sustained by the respondent arising from the appellant's obstruction. It must be assumed upon the evidence that the defendant represented himself in September, 1873, when plaintiff attempted to execute the decree of 5th June, 1873, as being in possession of the profits derivable by Kalowa from the two villages. Under these circumstances, he made

* Appeal No. 22 of 1879 (P. 23 of P. J. 1880.)



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SEKINIVAS.

himself liable, in the event of his turning out to be a trespasser as regards the plaintiff, to recoup the plaintiff for everything which he might have recovered, had it not been for defendant's obstruction ; and we think that the sums paid to the judgment-creditors of Kalowa, as well as the sums recovered by Kalowa herself, come under that category. These as shown by the evidence of the Kulkarnis, amount to Rs. 324-6-5. As to the sums stated by the Kulkarnis to have been not recovered, it is sufficient to say that the plaintiff himself got into possession before their recovery was barred, and if he has neglected to take proceedings to recover them, he cannot now make the defendant liable for the consequences. The decree must, therefore, be varied by substituting Rs. 324-6-5 for the sum of Rs. 2,100 mentioned in the decree. Costs in proportion throughout.

1880

January 12.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

VINAYAK LAKSHMAN (Applicant) Appellant, v.
SAVITRIBAI GOVIND, *et al* (Opponents)
Respondents. *

*Appeal—Order refusing certificate under Act XXVII
of 1860 not a 'decree.'*

An order of a District Court refusing to grant a certificate under Act XXVII of 1860 is not a decree within the meaning of S. 2 of Act X of 1877 and therefore no appeal lies against such an order.

This is an appeal against the order of the Judge of Ratnagiri, in application No. 20 of 1879 under Act XXVII of 1860.

In the case of Vishvnath Hari *et al* ; (appellants) (1) a Division Bench of this Court ruled, "The Court is of opinion that it is discretionary with the District Judge to grant or to refuse a certificate under Act XXVII of 1860, and that, if he has refused to grant a certificate, no appeal lies, under Section 6 of the Act, against his order." Under this ruling, in which we entirely concur, the present appeal cannot lie. It is contended by the pleader for the appellant that the law has been altered by the new Code of Ci-

* Appeal No. 4 of 1879 (P. 26 of P. J. 1880.)

(1) 7 Bom. H. C. Rep. A. C. J. 71.

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vil Procedure, and that this appeal will lie under Section 540 of the Code ; because, by that section, an appeal unless expressly prohibited, lies from all decrees, and the order here appealed against is a decree. We are, however, of opinion that the order of the District Court in this case is not a decree within the meaning given to the word decree in Section 2 of the Code of Civil Procedure. A decree is defined in Section 2 as meaning " the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regarded the Court expressing it, decides the suit or appeal. " In the present case the District Court did not decide a suit or appeal : but simply disposed of an application under Act XXVII of 1860. We reject the appeal with costs.

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VINAYAK
v.
SAVITRIBAI.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

1880

KODEPA ANDENIAPA (defendant) Appellant v.
BALAJI TIMAJI (plaintiff) Respondent. *

January 26.

*Application to rehear appeal decided ex parte—Civ. Pro.
Code, S. 56.*

An application made under S. 560 of the Civ. Pro. Code to rehear an appeal decided *ex parte* cannot be summarily rejected, but must be considered on its merits.

This is an appeal against the order of the Judge of Dharwar, in Appeal No. 118 of 1878.

The plaintiff Balaji Timaji sued the defendant Kodyapa in the Subordinate Court at Haveri : but his claim was rejected. The plaintiff then filed an appeal in the District Court at Dharwad. Notice of this appeal could not be served on defendant personally ; as he was absent from home, when the bailiff took the notice to the defendant's village. Upon this, the bailiff affixed a copy of the notice on defendant's house, on the 23rd January 1879. The District Court (Scott District Judge) decided the appeal on the 24th March 1879 *ex parte*, defendant not appearing, and reversed the decree of the Subordinate Court and awarded the claim against the defendant.

• Appeal No. 16 of 1879 (P. 27 of P. J. 1880.)



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On the 28th May, 1879, the defendant made an application, under Section 560 of the Code of Civil Procedure, to the District Court to re-hear the appeal, on the grounds, that he did not receive notice of the appeal as he was absent from home when the notice was brought to his village, that he is a man of 80 years of age, and, at the time when the notice was attached to his house, was absent on business at Nandihali in the Savanur State and fell ill there, and that he was thus prevented from appearing in the Appellate Court.

This application was summarily rejected by the District Court (Sandwith District Judge) with this order. "The pleader urges the illness of his client. This is, however, insufficient under all the circumstances, and I cannot re-admit appeal, and dismiss the application accordingly." The order really amounts to rejecting the application for no reason at all. The illness may or may have not been a sufficient cause to account for the defendant's not attending when the appeal was called on for hearing. If the defendant is a man of 80, and was detained by illness at Nandihali, he may perhaps, not have heard of the notice being affixed to his house, or, hearing of the notice, he may have been prevented by illness from coming to Dharwad in time, or from instructing a pleader to conduct his case in the Appellate Court.

We think the application under Section 560 has not been considered on its merits as it should have been, and that we must, therefore, reverse the order of the District Court dismissing it and direct the District Court to reconsider it on its merits.

Costs of this appeal are to follow the final decision of the suit.

ROBERT HILL PINHEY, J. —I observe that the District Court admitted the application, although it contained statements of fact, without requiring it to be varified. If the District Court had rejected the application on the ground that it was not varified, I might not have thought it right to interfere with his order of rejection, but it was not on this ground that the order of the District Court proceeded.



Before Mr. Justice Pinhey and Mr. Justice Melvill.
**TRIMBAK BHIKAJI Applicant v. NARO RAM-
CHANDR by his manager Vasudev Gangadhar**
Opponent. *

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Revision—Extraordinary jurisdiction.

A party to a suit is not entitled to invoke the extraordinary jurisdiction of the High Court simply because the decision of the lower Court is wrong. It is exercised generally only when a lower Court has exceeded its jurisdiction or has declined to exercise a jurisdiction with which it is clothed or where great irreparable wrong is done by a decree or order of a lower Court. It will thus be not exercised in a case in which a member of an undivided Hindu family has been granted a decree for his share of an inam village without suing for a general partition.

This is an application against the decree of the Judge of Ratnagiri in Appeal No 196 of 1878

We consider that the rule should be discharged. A party to a suit is not entitled to invoke the extraordinary jurisdiction of this Court simply because the decision of the lower Court is wrong. The extraordinary jurisdiction of this Court is exercised generally only when a lower Court has exceeded its jurisdiction, or has declined to exercise a jurisdiction with which it is clothed; or where great and irreparable wrong is done by a decree or order of a lower Court. In the present case, in which no second appeal lies to this Court, plaintiff sued for a one-fourth share of an inam allowance received by defendant. The Courts below have found that plaintiff is entitled to receive one-fourth share, and has regularly received such share, and have, therefore, awarded the claim. The only ground taken here against the decrees of the Courts below is the extremely technical one, that as the family of the parties is united, the plaintiff should not have sued to recover his one-fourth share of the inam allowance, but have sued for a general partition of the family property. In the circumstances of this case, the amount at issue being only Rs. 43-8-0, and the law allowing no second appeal to this Court, we do not consider it necessary to interfere by the exercise of our extraordinary jurisdiction.

We discharge the rule without making any order as to costs.

* Extra. Application No. 110 of 1879 (P. 32 of P. J. 1880),

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January 27.

Before Mr. Sargent, M. Melvill and R. H. Pinhey.

BAI SHIVKOR Plaintiff v. DULICHAND BHUDER-
DAS and others Defendants. *

Stamp—Receipt.

A receipt for ornaments does not require to be stamped.

This is a Reference from the First Class Subordinate Judge of Ahmedabad, under Section 49 of Act I of 1879.

The document is simply a receipt for ornaments not falling within the provision of Article 7, Schedule 2 of Act XVIII of 1869 or of any other article in the Schedule and therefore does not require to be stamped.

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February 3.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

AMANJI ISE (plaintiff) Appellant v. JAVHER
KAKABHAI (Defendant) Respondent. †

*Bhagdari tenure—Alienation of part of Bhag—Bom. Act
V of 1862, S. 3.*

Where the owner of an entire *Bhag* succeeds by inheritance to a share of a survey number, which the Revenue authorities proceed to incorporate with the original *Bhag*, this will not prevent the owner from alienating the original *Bhag*. Such an alienation is not contrary to the provisions of S. 3 of Bombay Act V. of 1862.

There is nothing in that Act which empowers the Revenue authorities to alter or add to existing recognized sub-divisions. Much less can the inference be deduced from that Act that the Revenue authorities are empowered to add the property of A to that of B, so as to prevent the amalgamated properties of A. and B. from being liable to the ordinary incidents of property, i. e., sale, mortgage or alienation.

This is a second appeal from the decision of the District Judge of Surat, in Appeal No. 52 of 1877.

R. H. PINHEY :—This action was instituted by plaintiff to recover the amount due at the foot of a mortgage-deed, against the property specified in the deed, and called a *bhag*. The suit was brought against Mitha Dasu, to whom the *bhag* originally belonged, and also against Javher Kaka-bhai, who, at a date subsequent to the date of the plaintiff's mortgage deed, purchased the property specified in the deed

* Civ. Ref. 18 of 1879 (P. 33 of P. J. 1880.) *

† S. A. 415 of 1879 (P. 41 of P. J. 1880)



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and other property inherited by Mitha Dasu which the Revenue authorities had incorporated with the bhag, at a date anterior to the date of the sale to Javher Kakabhai and also anterior to the date of the mortgage to the plaintiff.

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The mortgage-deed of plaintiff was duly registered and has been proved. There is no question about its genuineness, and Mitha Dasu, against whom judgment was given in both the Courts below, has not appealed. The District Court at Surat (Birdwood, District Judge), however, reversed the decree of the Joint Subordinate Judge of Bharoch in so far as it awarded the claim against the property specified in the mortgage-deed, on the ground that the property mortgaged by the deed was at the date of the mortgage-deed only a portion of a bhag, and that by the provisions of Section 3 of Bombay Act V of 1862 the mortgage of a portion of a bhag is declared null and void.

The preamble of Bombay Act V of 1862, after stating that the permanent tenures known as Bhagdari and Narwadari tenures have existed from time immemorial, goes on to declare that it is desirable to prevent the alienating, assignment, mortgaging, charging, or encumbering of any portion of any bhag or share in any Bhagdari or Narwadari village other than a recognised sub-division of such bhag or share and that, therefore, it is enacted as follows. Now, two facts are found in this case, viz :—1st, that the property mortgaged to the plaintiff was originally a whole bhag which belonged to Mitha Dasu ; and, 2nd, that some time after February, 1873, Mitha Dasu acquired by right of inheritance 1/36 share of Survey No. 34 which the Revenue authorities then proceeded to incorporate with his original bhag. The first remark that these findings suggest is that the new bhag, composed of the old bhag+1/36 of Survey No. 34, cannot be a recognised sub-division, which has existed from time immemorial. It may be further remarked that there is nothing in the Bombay Act V of 1862 which empowers the revenue authorities to alter or add to existing recognised sub-divisions. Much less can one deduce from the Act the inference that the Revenue authorities are by the terms of the Act empowered to add the property of A to the property of B so as to prevent the amalgamated properties of A and

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B from being liable to the ordinary incidents of property—
liable, that is, to sale, mortgage, or alienation.

The original bhag belonging to Mitha Dasu was actually sold in execution of a decree against Mitha Dasu and was purchased by the plaintiff's father on 6th February, 1873. After this and while the original bhag was the property of plaintiff's father, Mitha Dasu inherited the 1/36 of Survey No. 34, and the revenue authorities proceeded to incorporate it with the original bhag which had at that time passed from Mitha Dasu. Subsequent to this, plaintiff agreed to reconvey the original bhag to Mitha Dasu, leaving the purchase-money as a charge on the original bhag. After this, Javher Kakabhai purchased from Mitha Dasu the new bhag composed of the original bhag and of the 1/36 share of Survey No. 34. But it is clear that what plaintiffs took in mortgage was the recognised sub-division or original bhag which he had once purchased as such, and that the mortgage of this recognised sub-division or bhag is not contrary to the provisions of Section 3 of Bombay Act V of 1862, and that, therefore, plaintiff is entitled to have the amount of his claim decreed against the property mortgaged to him. As between the parties to this suit, there can, I conceive, be no doubt that plaintiff must succeed. Whether the Revenue authorities can hereafter effectually interfere under Section 2 of the Act, we need not now consider, as neither the Collector nor any other Revenue authority is a party to this suit.

We must reverse the decree of the District Court and restore that of the Subordinate Judge, and direct defendant Javher Kakabhai to bear all costs in the District Court and in this Court.

F. D. MELVILL J.—It has been found by the Lower Courts that the property which forms the subject of dispute was originally an entire Bhag belonging to Mitha from whom it passed by sale to plaintiff. After this and while plaintiff was the owner of the property, the Revenue authorities incorporated into the Bhag certain land which had come to Mitha by inheritance; in other words, they combined the property belonging to one man with that belonging to another, and thus, as it has been argued, formed a new and enlarged Bhag,



subject to all the provisions of Bombay Act V of 1862. What right the Revenue authorities had to do this has not been shown, and it does not appear necessary now to enter into the question. So far as appears in the present case, plaintiff was the legitimate owner of certain property, and he had an undoubted right, which, it seems to me, is not inconsistent in any way with the provisions of the above Act to sell this to Mitha and take it again on mortgage, and he has, therefore, a perfect right to enforce his claim as mortgagee.

I, therefore, consider that the decree of the District Judge must be reversed and that of the Subordinate Judge be restored.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

NAGINDAS RAMCHANDR Applicant *v.* LALU
DHARAMCHAND and others Opponents. *

*Execution of decree—Attachment before judgment—Civ.
Pro. Code, S. 489.*

By S. 489 of the Code of Civil Procedure attachment before judgment does not bar any person holding a decree against the defendant from applying for the sale of the property under attachment, in execution of such decree.

This is an Application against the order of the First Class Subordinate Judge of Ahmedabad, dated 25th July, 1879.

The rule *nisi* must be discharged,

On the application of Nagindas Ramchand, the First Class Subordinate Court at Ahmedabad attached Keval's property before Judgment: but before Nagindas got a decree, Hargovan Karunashankar obtained a decree in the Small Cause Court at Ahmedabad against Keval, and the Small Cause Court ordered the sale of the same property. By Section 489 of the Code of Civil Procedure, attachment before judgment does not bar any person holding a decree against the defendant from applying for the sale of the property under attachment, in execution of such decree. Therefore, the First Class Subordinate Judge was right in

° Extra. Application 102 of 1879 (P. 43 of P. J. 1880.)

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handing over the property of Keval, against whom he had not yet made a decree, on the requisition of the Small Cause Court to the Small Cause Court for the purpose of being sold in execution of the decree or decrees passed by the Small Cause Court against Keval. Of course, if any surplus remain after the satisfaction of the Small Cause decree or decrees under which the property is sold, it will have to be sent back to the First Class Subordinate Court for disposal.

The rule *nisi* is discharged with costs.

Nagindas stated in his application to this Court that his application for execution, since filed in the First Class Subordinate Court, has been sent by that Court to the Small Cause Court for disposal. If this be so, the First Class Subordinate Court was wrong in so doing and should recall the application.

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Before Mr. Justice Pinhey and Mr. Justice Melvill.

HARI VISHVNATH Appellant v. BAWAJI GAN-
PATRAV Respondent. *

Sale in execution of decree, setting aside—Inadequacy of price.

The smallness of the sum realised at a sale in execution of a decree is not a sufficient ground for setting the sale aside, if there has been no material irregularity in publishing or conducting the sale.

This is an appeal against the order of the Second Class Subordinate Judge of Chiplum in Miscellaneous Application No. 30 of 1879.

It is impossible to uphold the order of the Subordinate Court. The property of the judgment-debtor was sold by auction, and the Subordinate Judge held that the auction was not irregular or i. e., there was not any material irregularity in publishing or conducting the sale within the meaning of Section 311 of the Code of Civil Procedure. The Subordinate Judge however, set aside the sale because the property was purchased by the appellant in this Court for a sum wholly inadequate. The property sold consists of 26 thikans and was sold for Rs. 6-5-6. The smallness of the

* Appeal No. 19 of 1879 (P. 46 of P. J. 1880.)

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sum realized at sale was not, however, a sufficient ground for setting aside the sale, if there was no material irregularity in publishing or conducting the sale. We are bound, therefore to set aside the order passed by the Subordinate Court under date 7th August, 1879 and to remand the case for disposal according to law.

Before proceeding further with the case, however, we direct the attention of the Subordinate Judge to an objection raised in the application by Bawaji, the judgment-debtor, which appears to have escaped the notice of the Subordinate Judge, and we direct him to make due enquiry regarding it. In this application Bawaji, asserts *inter alia*, that his Judgment-creditor is khot of his village, and prevented others from bidding for property, while he himself purchased it through his relative the present applicant. This is an allegation which should be thoroughly inquired into under Section 294 of the Code of Civil Procedure, and disposed of before any order is made by the Subordinate Court for confirming the sale. It is alleged by the pleader of Bawaji in this Court that the property sold for Rs. 6-5-6 measures 70 acres and has trees on it.

The order of the Subordinate Court is reversed, and the case remanded to the Subordinate Court for disposal. Costs in this Court are to follow the final result of the case.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

SHETH MAYABHAI PREMABHAI (defendant)
Appellant v. MOTILAL TRIBHUVANDAS (Ap-
plicant) Respondent. *

*Limitation—Act XV of 1877, Sch. II, Art. 180—Exe-
cution of decree of High Court—Revivor—Act X of
1877, S. 230.*

A decree of the High Court, dated 22 February, was sent to the District Court at Ahmedabad for execution. On the 4th February 1879, an order was made in the High Court by a Judge in chambers on a summons to the judgment-debtor, to show cause why execution should not issue, ordering execution to be had. On the 30th July 1879, an application for execution made to the Ahmedabad Court was rejected for

* Appeal No. 18 of 1879 from order (P. 47 of P. J. 1880.)

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informality. A fresh amended application was presented on the 26th August 1879. *Held* that the order of the Judge in chambers of the 4th February 1879, revived the decree, and that the judgment-creditor had under art. 180 of Sch. II of Act XV. 1877, 12 years from that date in which to execute the decree, unless that period had been shortened by the amended or unamended S. 230 of Act X of 1877 (Civil procedure Code).

Held also, that the period had not been so shortened under either section. The application of 30th July 1879 had not been granted, but was refused. Both sections saved from their operations proceedings taken to enforce decree within 3 years from the passing of the Code, unless the decree should have become time-barred within the 3 years by the law in force immediately before the passing of the Code. And by the terms of the unamended S. 230, the order granting the present application for execution was conclusive evidence that due diligence was used to procure complete satisfaction under the last preceding application.

Appeal against the order of the First Class Subordinate Judge of Ahmedabad, in Darkhast No. 1208 of 1879.

This is an appeal from an order made on the 10th September, 1879 by the First Class Subordinate Court at Ahmedabad (Mukundrai Manirai, Subordinate Judge) for the execution of a decree passed on the original side of the High Court on the 22nd February 1867, and sent by the High Court under Section 223 of the Code of Civil Procedure for execution to the District Court of Ahmedabad, which Court, under Section 226 of the Code, directed the First Class Subordinate Court to execute it.

The objection taken by the Judgment-debtor here, as in the First Class Subordinate Court, to the execution of the decree is that it is barred by the law of limitation.

The Application for execution, on which the order appealed against was made, was preferred in the First Class Subordinate Court on the 26th August, 1879, and, therefore, Act XV of 1877 is the law of limitation applicable to it : and as the decree of which execution is sought was made by the High Court of Bombay in the exercise of its ordinary civil jurisdiction, the period of limitation applicable is that prescribed by Article 180 of Schedule II of Act XV of 1877, viz., twelve years.

As the decree is dated 22nd February, 1867, and the application for execution was made on the 26th August,

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1879, the application is of course barred unless some of the events have happened contemplated by the proviso in Column 3 of Article 180.

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It is however, contended for the Respondent Motilal Tribhuvandas, the purchaser of the decree obtained by Tribhuvandas Jagjivandas against the appellant Mayabhai Premabhai, and of which execution is sought, that the decree was revived by an order of the High Court, dated 4th February, 1879, and that, therefore, the twelve years prescribed in Column 2 of Article 180, must, under the proviso in Column 3 of that Article, be computed from the date of such order.

On the other hand, it is contended for the appellant Mayabhai Premabhai, (1) that the order of the High Court, dated 4th February, 1879, does not operate as a revivor of the decree, but is simply an order for the execution of the decree, such as is contemplated in Section 249 of the Code of Civil Procedure, (2) that even if the order of 4th February, 1879, did revive the decree, the application is barred by Section 230 of the Code of Civil Procedure, as amended by Act XII of 1879, and (3), lastly, that if this application is not barred by the terms of Section 230 of the amended Code, the decree having become time-barred before the section was amended, its operation cannot be revived by the subsequent amendment of Section 230.

If the decree was not revived by the order of the 4th February, 1879, the case for the respondent comes to an end, and the other two grounds taken by appellant need not be considered. It is, therefore, of primary importance to determine the effect of that order, and it was mainly to this point that the arguments of the learned counsel, who appeared before us, were directed.

For the appellant it was contended by Mr. Jardine, that the order of the 4th February, 1879, was not, as it did not profess to be, an order of revivor, but simply an order for execution of the decree, such as is contemplated by Section 249 of the Code of Civil Procedure, and such as was necessary under the proviso of Section 248, because more than one year had lapsed between the date of the decree and the application for its execution ;—that an order for execution is not the same

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SEETH Article 179 with Article 180 ;—and that an order of revivor
MAYABHAI is an order unknown to the Civil Procedure Code.
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-In support of his contention for the respondent, that the order of the 4th February, 1879, was a revivor, Mr. Farran, while admitting that the term revivor was unknown to the Code of Civil Procedure, contended, nevertheless, that the term had a well recognized meaning on the original side of the High Court ; that an order of revivor would keep a decree alive in the High Court, and that, therefore, it could keep it alive for purposes of execution in a Mofussil Court. In support of his contention, he put the case before us in this way. In the Courts in England decrees were formerly revived by what were called Writs of Revivor. This procedure was modified by Sections 129, 130 and 131 of the Common Law Procedure Act, 15 and 16 Vict. C. 76. This was the Procedure Act which was in force in the Supreme Court up to the time of its amalgamation with the Sadar Court. After the High Court was established the procedure on the original side of the High Court was a mixture of the procedure of the old Supreme Court and of the Civil Procedure Code. This mixed procedure has continued and in conformity with former practice, the High Court has continued the practice of reviving decrees by summons, whenever necessary by reason, either of lapse of time or of a change, by death or otherwise, of the parties entitled or liable to execution, in the manner described in Section 129 of the Common Law Procedure Act. In the present case a summons was applied for before Bayley, J., on the 27th January, 1879, to the judgment-debtor to show cause why execution of the decree should not be had, and on the return of the summons, the order for execution, dated 4th February, 1879, was made, which operated as a revivor.

Mr. Farran's argument, and his statement of the practice that rules on the original side of the High Court, receives some confirmation from a consideration of the form of the order of the 4th February, 1879, and of the way in which it was obtained. It appears that without making any application for execution under Section 230 of the Code of Civil Procedure, the judgment-creditor, or rather his pur-

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chaser, the respondent went before a Judge in Chambers, and obtained a summons to the appellant to show cause why an order for execution should not be made, and upon no cause being shown, the order of the 4th February, 1879, was made. This procedure is analogous to that prescribed in the Common Law Procedure Act for reviving a decree. The notice which the Court is required to issue under Section 248 of the Code of Civil Procedure, if more than one year has elapsed between the date of the decree and the application for its execution, is undoubtedly one which the Court is intended to issue after an application for execution has been made to it. Certainly no Mofussil Court would think of issuing a notice under Section 248 of the Code of Civil Procedure, until after an application for execution had been presented. On the other hand, there is no reason, so far as the interests of justice are concerned, why a notice under Section 248 should not precede an application for execution, and, if such a notice is identical in its form and substance with a summons for the revival of a decree, it is not improbable that the High Court on its original jurisdiction side may after the application to it of the proviso of the Code of Civil Procedure, have continued to allow parties to apply for summons to revive before presenting an application for execution, instead of issuing a notice under Section 148 afterwards. The Machinery on the original side of the High Court is different from the Machinery of a Mofussil Court. In a Mofussil Court the Judge has to do a good deal which on the original side of this Court is done by the parties, or (more correctly) by those whom they employ professionally. In a Mofussil Court the Judge would order a notice to issue under Section 248, and would be responsible for so ordering of his own mere motion ; whereas, on the original side of the High Court, application for a summons or for a notice under Section 248 would be made to a judge by the party interested in getting such a summons or notice served, that is, by the decree-holder. We do not, therefore, think that the fact of the order of the 4th February, 1879, having been made after the decree-holder had taken out a summons before a Judge in Chambers, and before any application for execution was made, enables

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na to determine whether the order is one simply for reviving the decree under the Common Law Procedure Act, or an order made under Section 249 of the Code of Civil Procedure. The order does not on the face of it show under what provision of law it is made.

If the Common Law Procedure Act, 15 and 16, Vict. C., 76 were the Act governing the procedure of the High Court on its original side, or if Sections 129, 130 and 131 of that Act had been made applicable to the High Court on its original side, either by the Act creating the High Court, or by other competent authority, we should have had no difficulty in acquiescing in the correctness of Mr. Farran's argument, or in speedily arriving at the meaning to be attached to the words "revived" and "revivor" in Column 3 of Article 180 of Schedule II to Act XV of 1877; but, unfortunately, we know of no legal ground for holding that the Common Law Procedure Act, or any of its provisions apply to this High Court. It is not to that statute, therefore, that we can look for assistance, when endeavouring to determine the meaning to be attached to the words "revived" and "revivor." The Code of Civil Procedure is the procedure applicable alike to the High Court and to the First Class Subordinate Court at Ahmedabad, and it is within the four corners of that Act that a meaning for these words must be sought. The word revivor does not, so far as we recollect, occur in the Code of the Civil Procedure, and certainly the Code of Civil Procedure contains no definition of the term. It appears to me, however, that it is not difficult to arrive at a satisfactory conclusion as to the thing signified, although the particular word revivor is not used in the Code; and, that any difficulty that may be felt in interpreting the word arises from the fact that the Legislature, instead of using the simple language which it employed in Article 179 of the Limitation Act, has introduced into Article 180 a term which has a technical meaning in English Law. If, however, instead of going to English Law for a meaning, we endeavour to interpret revive, as one would any other English word used by the Indian Legislature, all difficulty disappears. To revive means to give fresh life—not to give new life to a dead thing: for a

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decree that has once become time-barred can never be revived ; but to give fresh life or energy or operative power to what is dormant or in a state of temporarily suspended animation. A decree that is more than a year old is dormant, temporarily inoperative. It cannot be executed without notice to the judgment-debtor, and a fresh order from the Court for its execution. This order for its execution revives it, or acts as a revivor. Therefore, although for a reason somewhat different from that urged by Mr. Farran, we hold that the order of this High Court, dated 4th February, 1879, revived the decree, which respondent seeks to execute, and that he has under Article 180 of Schedule II of Act XV of 1877 twelve years from that date in which to execute the decree, unless that period is shortened by the amended or unamended Section 230 of the Code of Civil Procedure—and this brings us to the next step in the determination of the present appeal.

First, it was contended for the appellant that this application is barred by Section 230 of the Code of Civil Procedure as amended by Act XII of 1879, because by Clause (a) of that section, it is enacted that when an application to execute a decree for the payment of money has been made under this section and granted, no subsequent application to execute the same decree shall be granted, after the expiration of twelve years from the date of the decree sought to be enforced, and previous application to enforce the decree now sought to be enforced was made in the First Class Subordinate Court at Ahmedabad, on the 30th July, 1879, and was rejected on the 23rd August, 1879. It would strictly speaking, answer this objection to remark that the application for execution, dated 30th July 1879, was *not* “ made under this section and granted,” but was made and was rejected, because it was deficient in form. But the objection need not be so answered. It is answered by the last clause of Section 230 which enacts that notwithstanding anything contained in the section, proceedings may be taken to enforce any decree within 3 years after the passing of the Code of Civil Procedure, unless when the period prescribed for taking such proceeding by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years. The Code of Civil Proce-

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dure came into force on the 1st October, 1877, so three years had not elapsed when the present application was made; and the period for executing the decree, would not expire sooner under the provisions of Act IX of 1871—the Law of Limitation in force when the Civil Procedure Code became law—than under the later Limitation Act XV of 1877.

But then Mr. Jardine argued that although the decree might not be time-barred by the Section 230 of the Code of Civil Procedure, as it now stands amended by Act XII of 1879, it became time-barred by the unamended Section 230 and, therefore, once time-barred by that section cannot be revived by the subsequent amendment of the section; because the repeal or amendment of a statute or other legislative enactment cannot, without express words, or clear implication to that effect in the repealing or amending Act take away a right acquired under the repealed or amended statute or other enactment while it was in force—*Sitara Vasudev vs. Khandarav Balkrishna*. * It becomes, therefore, necessary to consider what was the effect of the unamended Section 230 on the decree now sought to be executed. By that section it was enacted that when an application to execute a decree for the payment of money has been made under this section and granted, no subsequent application to execute the same decree shall be granted, unless the Court is satisfied that on the last preceding application, due diligence was used to procure complete satisfaction of the decree; and the order of the Court granting or refusing such subsequent application shall be conclusive evidence that due diligence was used to procure such satisfaction. The last preceding application for the execution of the decree was the one already mentioned, as made in the First Class Subordinate Court at Ahmedabad, on the 30th July, 1879, and it was rejected by the First Class Subordinate Court on the 23rd August, 1879, because the particulars in column 1 of the tabular form mentioned in Section 235 of the Code of Civil Procedure were not given in sufficient detail to meet the requirements of Clause (f) of that section, and although leave was applied for to amend the application by giving in full

* I. L. Rep. I Bom. 286.



the necessary particulars, the Subordinate Judge considered such amendments should under Section 245 be made at the time of the presentation of the Darkhast, and before it was registered, and this had not been done owing either to the negligence or the carelessness of the Mukhatyar of the applicant. It appears to us that the [rejection of this application cannot be held to bar the decree, even under the unamended Section 230 for four reasons :—

First, the preceding application was not made and granted under the section, but was made and was summarily refused.

(2) The unamended section contains the same provision as does the amended Section 230, saving from its operation proceedings taken to enforce decrees within three years after the passing of the Code, unless the decree shall become time-barred, within the three years by the law in force immediately before the passing of the Code.

(3) By the terms of the unamended Section 230, the order of the First Class Subordinate Court, granting the present application is conclusive evidence, that due diligence was used to procure complete satisfaction under the last preceding application ; and even if the section did not say this, as it was the same Court that rejected the first application, and granted the second, it would be difficult to hold that that Court did not know the meaning of its own first order, and when making its second order, did not rightly determine whether the applicant had used due diligence or not.

(4) The application of the 30th July, 1879, failed, not because the applicant did not use due diligence to procure complete satisfaction of the decree, but because the Subordinate Judge wrongly rejected it, instead of allowing it, to be amended : or, if the Subordinate Judge rightly rejected it, he rejected it for reasons which prevented the applicant from using due diligence to procure complete execution. When the application of the 30th July, 1879, was presented, the defendant appeared by Pleader on the same day without being summoned, and objected to the application, and the Court at once postponed consideration of the application at the request of the applicant's Mukhtyar to the 23rd August, 1879, because the applicant was in Bombay, and his Mukh-

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tyar could not proceed further in the matter without consulting his principal. On the 23rd August the applicant appeared by Pleader, and asked for leave under Section 245 to amend the application, by supplying the further details required in column 6. We are of opinion that in the circumstances of this case, considering that the applicant was in Bombay, and that the details required had to be got from the records of the original side of the High Court, the Subordinate Judge should have allowed the application to have been amended, and that he was wrong in rejecting the application altogether. Even, however, if the order of the Subordinate Judge was technically right, still we think the rejection of the application would not have had the effect of barring the decree under the unamended Section 230. The applicant presented a defective application, which might have been refused on presentation, or returned for amendment : but after it was accepted he showed no want of due diligence in going on with it. On the very first day to which its consideration was postponed he offered to amend it. He was prevented from doing so by the Court, and after that, he never had any chance of using any diligence in seeking to procure complete satisfaction of the decree.

We are, therefore, of opinion that every one of the objections taken by the appellant fails, and that the order of the First Class Subordinate Court, which has been appealed against, should be confirmed with costs.

February 10.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

BALAJI BHIKAJI by his agent DHONDBHAT
SITARAMBHAT (plaintiff) Appellant v. GO-
PAL RAGHU (defendant) Respondent. *

Enhancement of rent by joint landlord—Kabulayatdar Khot.

The Kabulayatdar khot or khots for each year do not generally represent the estate for all purposes so as to enable them to enhance the rent of tenants without the consent of the co-parceners.

This is a second appeal from the decision of the Judge of Ratnagiri, in Appeal No. 500 of 1878.

The parties to this case are the same as the parties to the case reported at I. L. R. L. 3 Bom. 23. In the present case

* S. A. No. 444 of 1879 (P. 53 of P. J. 1880.)

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plaintiff sues to recover enhanced rent from defendant for the years 1873-74 and 1875-76.

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It is admitted that for the year 1873-74 plaintiff and Antaji Krishna were the kabulayatdar khots, and that not only did Antaji Krishna not join in giving notice of enhancement, but that he is opposed to any enhancement being made. The case at I. L. R. 3 Bom 23 is conclusive as to the inadmissibility of this portion of plaintiff's claim.

In the year 1875-76 the kabulayatdars were plaintiff and Lakshman Hari, and they both joined in giving notice for that year. It is contended for the plaintiff that kabulayatdar khots represented the estate and could enhance the rent payable by the defendant—that the notice giving by them (albeit it was not joined in by the other coparceners in the estate) was valid notice—and that, therefore, plaintiff can claim the enhanced rent for which he sues in this suit. If the kabulayatdar khot or khots in each year represents or represent the estate for all purposes the contention of the plaintiff would be indisputable: but this is not so, speaking generally; nor is it so in respect of the particular village of Vareri according to the statements made by plaintiff in his statement recorded as Exhibit 30 in this case.

Suppose, for example, there are 4 khots in a village, and the management of the village instead of being by rotation is joint, it is obvious that no one of the 4 khots would be able to enhance the rents of any particular cultivator. And if instead of each taking his $\frac{1}{4}$ share of the rent paid by each cultivator, or instead of dividing at the end of the year into four parts the total realizations from the cultivators, the four khots agreed that each should collect every fourth year the whole proceeds of the village, no khot during his year of management would have any greater power of enhancement than if he managed jointly with the other three. The arrangement as to the collection of the rents would leave the right as to enhancement untouched. If that were not so, the tenants would have no security, and the managing khot would be able to harry the cultivators during his year of management and seriously injure the property of his co-parceners. This principle (so far at least as the cultivators are concerned) is clearly recognized in the case at I. L. R. 3 Bom. 23,

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although, in the judgment there reported, the Court considered only the fact of there being one other co-parcener in the khoti estate besides the plaintiff. And if the principle is applied to the present case, it is manifest that plaintiff's claim cannot be allowed. The khoti estate is held (see plaintiff's statement Exhibit 30) by two families, the Sawants and the Kulkarnis. The former have a 4 annas' share and the Kulkarnis 12 annas' share. The Kulkarnis' share again is sub-divided into two parts of six annas each, one of which belongs to plaintiff and the other to four other members of the family. The Sawants under the arrangements described in Exhibit 30 manage the village every fourth year—that is, they collect and retain the rents every fourth year. If the contention of plaintiff were allowed, and he were allowed to deal with the tenants on the estate as he pleased without the consent of all his co-parceners, the Sawants might find, when next their year of management comes round, that they have no cultivators left to collect rents from or only new and unskilled ones in whose hands the new estate would certainly and rapidly deteriorate in value.

We concur in the judgments of both the Courts below, and confirm the decree of the District Court with costs.

February 18.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

KAKA NATHU SHAMJI Muzawar of Hazrat Pir Imamshah, deceased, his successor **Kaka Kurumsey** (plaintiff) Appellant *v.* **HUSSUNALLI BAKERALLI**, deceased, his sons, **Mahomed Miya, Musa Miya, and Bura Miya** (defendants)

Respondents. *

*Declaratory decree—Cause of action—Right to sue—
Sanad under Bom. Act VII of 1863.*

The issue of a Sanad under Bombay Act VII of 1863 is an act so seriously affecting the title, or at all events so seriously affecting the enjoyment of the property, as to give to the real owner a right to sue for a declaration of title against a person whose name has been erroneously entered in the Sanad, even though the real owner may be in undisturbed possession of the property.

• S. A. No. 465 of 1879 (P. 60 of P. J. 1880.)



This is a second appeal from the decision of the District Judge of Ahmedabad, in appeal No. 169 of 1877.

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v.
HUSUNALLI.

The sanad of the property in dispute, which was issued by the Bombay Government under the provisions of Bombay Act VII of 1863, purports to continue the property in perpetuity to the Roza of Huzrat Pir Imamshah, which is represented by the plaintiff, and to the Roza of Bakeralli, the father of the respondents. It has been held by the Court below that the issue of this sanad gave to the plaintiff no new cause of action because the plaintiff was aware that the names of the respondent's ancestors had all along been entered in the Collector's books, and because, under the provisions of Bombay Act VII of 1863, a sanad does not conclusively establish that the holder of the sanad is the owner of the property. But it appears to us that the issue of a sanad is an act so seriously affecting the title, or at all events so seriously affecting the enjoyment of the property, as to give to the real owner a right to bring a suit for declaration of title against the person whose name has been erroneously entered in the sanad, even though the real owner may be in undisturbed possession of the property. A sanad granted under Bombay Act VII of 1863 is a title-deed ; and though it is not, any more than any other title-deed, conclusive evidence of title as against another claimant, yet the owner would be much hampered in dealing with the property, if it appeared on the face of his own title-deed that there was another claimant who had been recognized as part owner by the authority granting the sanad. We do not see how the owner could satisfy an intending purchaser or mortgagee, except by obtaining a declaratory decree against the person described as part owner in the sanad. It may be said that this general consideration has no application in the present case because the property in dispute is a religious endowment and, therefore, incapable of being alienated. But the mere acquiescence by the plaintiff in the entry of Bakeralli's name in the sanad might here after be used by Bakeralli's decendants as evidence that the property does not belong exclusively to the shrine of Pir Imamshah ; and on this ground alone the plaintiff may well desire to take the necessary steps to establish the exclusive title of the shrine which he represents. Nor can it be said that any declaration which the Civil Court may make



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HUSSUNALLI. cannot be made the foundation of consequential relief, for it appears that the Collector has expressed his willingness to have Bakeralli's name struck out of the sanad, if the plaintiff can establish in the Civil Court that the property belongs exclusively to the shrine of Pir Imamshah.

Then, as to the question of limitation, it is true that the cause of action arose on the date of the sanad, and that the present action is not brought within six years from that date. But during a portion of the interval, the plaintiff was engaged in prosecuting a suit upon the same cause of action against the same defendant, *bona fide* and with due diligence, in the District Court, and it was from defect of jurisdiction only that that Court was unable to decide the suit. The period so occupied ought, under the provisions of Section 14 of Act XIV of 1859, to be excluded from the computation of the period of limitation : and if it be excluded, the present suit is within time. The District Judge has held that the plaintiff cannot have the benefit of the above section, because he did not in his plaint state that he claimed a deduction of time on account of the former proceedings in the District Court. This would have been a sufficient reason for rejecting the plaint, when first presented, if the plaintiff had refused to make the necessary amendment, which, of course, he would not have refused to do, if the omission in his plaint, and its consequences, had been pointed out to him by the Subordinate Judge. But the omission to claim the exemption in the plaint was not, in our opinion, a proper ground for dismissing the suit, when, upon issue joined, it appeared that the plaintiff was in fact entitled to the exemption.

For these reasons, we reverse the decree of the District Court and remand the case in order that it may be determined whether the plaintiff has proved that the property in dispute belongs exclusively to the Roza of Huzrat Pir Imamshah, and if this be determined in the affirmative, that a declaratory decree may be passed, as prayed for.

As the plaintiff is to blame for the omission in his plaint, which has in a measure necessitated this appeal, we order that the plaintiff bear his own costs in this appeal. The respondent's costs will be costs in the suit and follow the final result.



*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Melvill.*

**The Directors of the JAFFER ALLI S. and W. Com-
pany Limited Applicants v. BHAIIDAS JEKI-
SANDAS et al Opponents. ***

Review—Extraordinary jurisdiction.

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**THE DIRECTORS
OF THE JAFFER
ALLI S. & W.
CO. LTD.
v.
BHAIDAS.**

It is not in every case that there may have been an error in law that the High Court ought to exercise its extraordinary jurisdiction under S. 622 of the Civil Procedure Code by interfering with the decree of a Court of inferior jurisdiction.

This is an Application against the decree of the Judge of the Court of Small Causes at Surat in Original suit No. 627 of 1878.

While agreeing in the opinion of the learned Judge of the Court of Small Causes that there is nothing in the contract between the parties here which rendered the opinion of the plaintiff's manager, Mr. Chandwick, conclusive upon the defendants, yet his positive testimony, that the cotton tendered was not first class Dhollera cotton, and that he, therefore, rejected it, placed upon the defendants the necessity of proving that the cotton tendered and rejected was first class Dhollera cotton. Two witnesses (Bhagawands Harkisandas and Nagingdas Gordhandas) who swore that they were present at the rejection of the cotton were disbelieved by the Judge. Their testimony, therefore, that the cotton tendered was first class cotton was valueless, as, not having been present, they could not know what cotton was tendered and rejected. Again, the fact that the plaintiff did not think proper to adopt any of the courses suggested in the letters of the defendants of the 16th and 17th May, 1877, (Exhibits 26 and 27) did not justify the learned Judge in assuming thence that the cotton rejected was first class Dholera cotton however reasonable those suggested courses may have seemed to the Judge, inasmuch as the plaintiff was not under any obligation to adopt any of those courses; nor did the refusal of the plaintiff to adopt them amount to any evidence whatever that the cotton rejected was first class Dhollera. The learned Judge would therefore, on this point, seem to have fallen into an error in law. But it is not in every case that there

* Extra. Application No. 127 of 1879 (P. 63 of P. J. 1880.)



1880 may have been an error in law that this Court ought to exercise its extraordinary jurisdiction, either under Regulation **THE DIRECTORS OF THE JAFARI** II of 1827, Section 5, Cl. 2, Section 15 of the Letters Patent or Section 622 of the amended Civil Procedure Code, by interfering with the decree of a Court of inferior jurisdiction. **ALLI S. & W. Co. LTD.** There is a conclusive reason in the present case why this Court ought not to order a new trial or otherwise interfere, and that is that the plaintiff has not proved that he suffered any substantial damage from the alleged default of the defendants to supply cotton of the quality stipulated. There is not a particle of evidence to show that at the time of the alleged breach of the contract by the defendants, i. e., on the 15th May, 1877, or thereabouts, the price of Dhollera cotton of the first class had risen, and that the plaintiff in order to obtain such cotton would have been subject to any loss by paying a price beyond that at which the defendants had contracted to supply to him 50 candies. The plaintiff, under such circumstances, could not at the utmost, have recovered a decree for more than nominal damages, and the fact that the Small Cause Court did not, in a case of no general importance such as this, award to the plaintiff nominal damages, could not justify the High Court in exercising its extraordinary jurisdiction. We do not overlook the assertion of the defendants that they re-sold the rejected cotton, some time after its rejection, to other parties at a higher price than that which the plaintiff had agreed to give, but the learned Judge does not seem to be satisfied, and we certainly are not so, that the cotton sold to the third parties was the same as that rejected by the plaintiff. We discharge the *rule nisi* with costs to be paid by the plaintiff to the defendants.

March 1.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

DEVIDAS JAGJIVANDAS (plaintiff) Appellant, v.
NARANDAS BHIKARIDAS, deceased. his sons
and heirs **HARJIVANDAS** and others (defendants) Respondents. *

Contract Act IX of 1872, S. 265—Form of application.

• Appeal No. 23 of 1879 (P. 69 of P. J. 1880.)

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No form of application under S. 265 of Act IX of 1872 is prescribed by the Act or elsewhere. It is immaterial if it be in the form of a

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v.

NARAYAN DAS.

plaint.
This is an appeal against the order of the Judge of the District of Thana, in Original Suit No. 20 of 1879, dated the 10th November, 1879.

This case was last before this Court on the 26th January 1880, when we made the following order:—

“ The District Court has given no reasons for holding that “ it has no jurisdiction in this case. Suit No. 9 of 1873, “ Janardan *vs.* Balaji, cited by the District Court, may be in “ point: but this Court cannot find out where this case is to “ be found. The District Court must be called on to certify “ its reasons. A brief statement of the reasons for returning “ it should, under the last clause of section 57 of the Code of “ Civil Procedure have been endorsed on the plaint.”

The District Court has now returned the order of this Court endorsed thus:—

“ The District Judge has the honour to forward a copy of “ the Judgment of the District Court in suit No. 9 of 1873, “ following which decision the District Court rejected the “ plaint in original Suit No. 20 of 1879—Devidas Jagjivan- “ das *vs.* Harjivan *et al.*”

From the copy of the judgment certified by the District it appears that the Court rejected the plaint in Janardan Arjunji *vs.* Balaji Ransodji *et al.*, on the ground that the plaint was not an application within the meaning of Section 265 of the Indian Contract Act for two reasons :—(1.) It was drawn in the form of a plaint in a regular suit and was presented, received, and registered as such : and (2) the Indian Contract Act, 1872, has not retrospective effect and did not therefore apply to the partnership referred to in the plaint which was dissolved in October, 1871, before the Act came into operation.

No form of application under Section 265 of the Indian Contract Act is prescribed by the Act or elsewhere. The present application appears to contain all that the section requires. If it were in the form of a plaint, we do not see why it should be rejected : but it appears not to be in the



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DEVIDAS
v.
NARANDAS.

form of a plaint. It is not headed as between a plaintiff and defendants : but as brought by the applicant or plaintiff against his opponents : It runs thus :—

I, Devidas Jagjivandas, of Chintoni, the aforesaid plaintiff, beg to represent as follows.

From this it appears that the business of the partnership closed from Shrawan Samvat 1933—10th August, 1877— and that applicant desires the precise relief contemplated by Section 265 of the Indian Contract Act.

We are, therefore, of opinion that the District Court was wrong in rejecting this application, and we, therefore, reverse the District Court's order and direct the District Court of Thana to receive the application and to proceed to dispose of it on its merits.

The costs of this appeal are to be in the discretion of the District Court.

March 17.

Before Mr. Justice West and Mr. Justice Melvill.

DATTATRAYA RAYAJI (plaintiff) Appellant v.
ANANT BAIKRISHNA and others (defend.
ants) Respondents.*

Evidence—Ancient documents.

Ancient documents by which a person proposes to make a title for himself, are of extremely slight value, except when connected with facts which corroborate them, established by independent evidence.

This is a second appeal from the decision of J. L. Johnston, Esq., Acting Assistant Judge of the District of Ratnagiri at Ratnagiri in Appeal No. 1 of 1878.

There is some evidence, as is admitted, that the defendant's ancestors were ryots in possession before the grant made by the Sawant Wari Government to the plaintiff's ancestor about 95 years ago. The Courts below have found that the holding has been at a uniform rent, and a number of receipts for recent years show that in that time it has not varied. It is urged for the plaintiff in appeal that the documents Nos. 3 and 4, two Kabulayats, the former for 1839 and the latter for 1853, do show that the rent in the earlier was less than in the more recent year. The Subordi-

* Appeal No. 404 of 1879 (P. 76 of P. J. 1880.)

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nate Judge was inclined to think the proof of these documents sufficient, but he did not distinctly find that they were proved or not. The kabulayat No. 3 being dated in 1839 "proves itself," according to the rather loose expression commonly used, that is, it was admissible as evidence as connected with the plaintiff's estate and coming from his custody. But, as has been repeatedly said in this Court, such documents, by which a person proposes to make a title for himself, are of extremely slight value, except when connected with facts which corroborate them, established by independent evidence. The Subordinate Judge, however, simply says it is not necessary to give any positive finding on the fact of their genuineness. We should find it hard to agree with him as to this. The documents Nos. 3 and 4 are certainly material, and, if proved, ought to be carefully considered along with the other evidence. The nature of the inquiry to be made in such cases has been explained in some recent decisions of this Court—Pratapav Gujar *vs.* Bayaji Namaji and others and Parsotam Keshavdas *vs.* Kalyan Rayji (1), and the Court below, having found whether the documents 3 and 4 are genuine or not, will then pronounce on the right asserted by the plaintiff, according to the principles laid down in the cases to which we have referred.

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DATTATRAYA
v.
ANANT.

We reverse the decrees of the Courts below, and remand the cause for retrial and a new decree on the merits. Costs to obide the final decision.

Before Mr. Justice Melvill and Mr. Justice Pinhey.
MURHARJI BALOJI (plaintiff) Appellant *v.* **NAN-**
CHAND KESHAVJI et al (defendants) Respon-
dents. *

March 22.

Practice—Alternative case.

Having regard to the statement in the plaint and to the issues framed the plaintiff is entitled to be regarded as having made an alternative case from the first, and as having claimed to fall back on his mortgage in the event of his claim as purchaser being disallowed: Held that

9 S. A. No. 352 of 1879 (P. 77 of P. J. 1880.)

(1) See. I. L. R., 3 Bom. pp. 141, 348.

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v.
NANOCHAND.

the plaintiff should be allowed to rely upon his mortgage, though he has failed to prove his purchase.

This is a second appeal from the decision of **Rav Bahadur Gopalrav Hari**, Joint Judge of Thana, in Appeal No. 244 of 1877.

Having regard to the statement in the plaint, and to the issues framed by the Subordinate Judge, we are of opinion that the plaintiff is entitled to be regarded as having made an alternative case from the first, and as having claimed to fall back on his mortgage, in the event of his claim as purchaser being disallowed. Under these circumstances, we think that the plaintiff should be allowed to rely upon his mortgage, though he has failed to prove his purchase. We, therefore, reverse the decree of the District Court, and restore that of the Subordinate Judge, with costs of appeal and second appeal on respondent **Motiram**.

March 31.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

BALKRISHNA NANDRAM Applicant *v.* **KESHAVLAL CHHOTALAL** Opponent. *

Procedure—Witnesses, refusal to examine.

A Judge cannot refuse to examine witnesses called by a party to a suit on the ground that they are intended to say the same thing as a witness whom he has disbelieved.

This is an application against the decree of **Khan Bahadur C. M. Cursetji**, Small Cause Court Judge of **Abmedabad**, in Original Suit No. 2420 of 1879.

In his letter No. 18 of the 13th February, 1880 the Judge of the Small Cause Court reports that he did not examine certain witnesses called by the plaintiff, because they were intended to say the same thing as a witness whom the Judge had disbelieved, and therefore the Judge says that the hearing of the said witnesses would not materially have influenced his decision, and would have needlessly taken up public time.

The plaintiff was entitled to have his witness examined, and the refusal of the Judge to do so for the reasons stated by him, was, to use the words of the Judicial Committee in

* Extra. Application No. 149 of 1879 (P. 87 of P. J. 1880.)



Jeswant Singji vs. Jet Singji (1), "wholly irregular, and detrimental to justice."

1880

BALESHWAR

KARAVALLI.

The decrees in this suit, and in Suit No. 2544 of 1879, which was between the same parties, and was heard jointly with this suit, and decided on the same evidence, must accordingly be reversed, and the suits remanded, in order that the evidence of Vishnuram and Chotalal, the witnesses named in the Darkhast, Exhibit No. 7, may be taken, if they are forthcoming, and that new decrees may be passed, on a consideration of the whole evidence on the record.

The costs of this application will be costs in the cause and the costs of the application to this Court No. 11 of 1880 will be costs in Suit No. 2544 of 1879.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

April 12.

AMARCHAND RAMCHANDRA et al (defendants)

Applicants vs. LADHA KARARI (plaintiffs)

Respondent. *

***Jurisdiction—Military Court—Act XI of 1841, Ss. 2, 17—
Appeal.***

In order to give a Military Court jurisdiction in a case where the claim is under Rs. 200 the defendant must not only carry-on business in a military bazar, but must also reside within the station. And where the claim exceeds that amount, he must be a person amenable to the articles of war.

Under S. 17 of Act XI of 1841 the High Court has jurisdiction to entertain an appeal from a decision of a Military Court at Disa.

This is an appeal from the decision of the Native Court of Requests held at Disa, in Case No. 1.

This is an appeal cognizable by this Court under Section 17 of Act XI of 1841, the decision appealed from being the decision of a Military Court assembled at Disa and the amount of claim exceeding Rs. 200.

It is contended for the defendants, the appellants here, that the Military Court had no jurisdiction in the case, and we are of opinion that this objection is a good one, for two reasons :—

(1) 2 Moore's I. A. 424.

◊ Appeal No. 1 of 1880 (P. 98 of P. J. 1880.)

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v.
LADHA.

1. In the first place, under Section 2 of Act XI of 1841, a Military Court has jurisdiction against defendants other than persons amenable to the Articles of War, if the defendants reside within the station, and carry on business in a Military bazar. Both these conditions must cohere to give the Military Court jurisdiction. In the case before the Court the defendants, although they deal in the cantonment of Disa do not reside in the cantonment, but in the town of Rajpur in the State of Palanpur. Therefore, even if the amount of claim had not exceeded Rs. 200, the Military Court would have had no jurisdiction against the defendants in the case under Section 2.

2. But the amount of claim being Rs. 550 the Military Court exercised an enlarged pecuniary jurisdiction under Section 17 of the same Act, but even under that section the Court could exercise no jurisdiction as against the present defendants, because that section only gives jurisdiction to Military Courts "against persons so amenable as aforesaid," that is, "persons amenable to the Articles of War" referred to in Section 2, and the defendants are not in any way shown to be persons amenable to the Articles of War.

The decrees of the Military Court must, therefore, be reversed, and the claim of the plaintiff rejected with costs in this Court. As no plea to the jurisdiction appears to have been taken in the Court below, each party will bear his and their own costs in the Court below.

April 12.

Before Mr. Justice Pinhey and Mr. Justice Melvill.

SITARAM BALKRISHN (Auction—purchaser) Appellant v. GOVIND ANANT, deceased, his sons and heirs, SAKHARAM, and JANARDHAN deceased by his widow GANGABAI (Applicant and defendants) Respondants. *

Procedure—Application to set aside execution sale—Notice—Appeal—Civil Procedure Code, Act X of 1877, S. 312.

Where an application is made by judgment-debtor to set aside a sale in execution of a decree, notice must be given to the parties named in

* Appeal No. 6 of 1880 (P. 99 of P. J. 1880.)

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the application. It is not enough to give an oral intimation to the pleader for the applicant that the application will be enquired into on a day named.

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SITARAM

v.

GOVIND.

No appeal lies from an order made *ex parte* under para 2 S. 312 of Act X of 1877.

This is an appeal against the order of the Subordinate Judge of Dapuli (Rao Saheb Sakharam Krishnashet) in Application No. 120 of 1879 (Darkhast No. 399 of 1879).

The order of the Subordinate Court may be right or wrong in substance : but the Subordinate Court was clearly wrong in making the order without giving notice to the parties named at the head of the application.

The property of the respondents having been sold in the execution of a decree obtained against their father Govind Anant Vaidya, deceased, by Govind Bachaji Vaidya, the respondents under Section 311 of the Code of Civil Procedure, applied to the Subordinate Court to set aside the sale on the ground of a material irregularity in publishing it, and made both the judgment-creditor and the auction purchaser parties to his application. Of course, on receipt of this application, the Subordinate Court should have given notice to the parties named in the application : but, instead of doing this, the Subordinate Court merely gave an oral intimation to the pleader of applicants that he would enquire into the application on a date named, and on a subsequent date he proceeded, for certain reasons, to make an order setting aside the sale.

No appeal, however, lies from the Subordinate Court's order, as it was made *ex parte*, and under the second para of Section 312 of the Code of Civil Procedure. Clause 16 of Section 588 of the Code allows an appeal only when the order of the Court below has been made under the first para of Section 312.

This appeal must, therefore, be dismissed, and the appellant left to seek a remedy by applying to the Subordinate Court, (if so advised), to review its decision, on the ground that he had no notice of the application on which the decision, of which he complains, was passed.

We make no order as to costs of this appeal.



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BOMBAY HIGH COURT

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April 14.

Before Sir Michael Roberts Westropp, Kt., C. J. and Justice Melvill.

**MULJI RAJARAM and others (plaintiffs) Appellants
vs. KESHAVLAL JEBHAI and others (defend-
ants) Respondents. ***

Right to sue—Cause of action.

The statement of the defendant's pleader in a suit to which the plaintiffs were not parties, denying the right of any person to enter a particular temple without the permission of the plaintiffs in that suit who are the defendants in the subsequent suit, constitutes no cause of action.

This is an appeal from the decision of Rav Bahadur Mukundrai Manirai, First Class Subordinate Judge of Ahmedabad, in Original Suit No. 117 of 1877.

We affirm the decree with costs, on the ground that the statement of the defendants' pleader in another suit, to which the plaintiffs were not parties, in denial of the right of any person to enter the temple at Dakore without the permission of the plaintiffs in that suit, who are the defendants in the present suit, constitutes no sufficient cause of action.

April 19.

Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

**BAYAJI KRISHANJI et al (plaintiffs) Appellants
vs. NATHA RAGHOJI (defendant) Respondent. †**

Estoppel, by conduct.

A tenant in possession of land who consents to make over the land to an intending purchaser from his landlord and thereby induces the purchaser to pay the purchase money and complete the sale, is estopped from denying the purchaser's right to recover the land.

This is a second appeal from the decision of R. F. Mactier, Esquire Judge of the District of Satara, in Appeal No. 41 of 1877.

The District Judge says (and we think that his conclusion correctly describes the effect of the evidence, as stated in his judgment), that " Bazi had, before speaking to Natha,

* Appeal No. 21 of 1879 (P. 103 of P. J. 1880)

† Appeal No. 423 of 1879 (P. 105 of P. J. 1880.)

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“settled to sell the land to plaintiff, who agreed to buy it, on being assured that he would have no trouble in getting rid of Bajai’s tenant, Natha ; and Natha’s consenting to make over the land to plaintiff, caused the sale to be completed.” On this state of facts, we think that the District Judge ought to have found in the affirmative on the second issue sent down by this Court. Natha by his declaration caused the plaintiff Bayaji to believe that he (Natha) was ready to give up the land, and it was on the strength of this belief that Bayaji paid the purchase money and completed the sale, which he would not have been bound to do, unless he had been satisfied that he could get possession of the land. Under these circumstances, Natha is estopped from denying the Plaintiff’s right to recover the land. We, accordingly, reverse the decree of the District Court, and restore that of the Subordinate Judge, with all costs on defendant throughout.

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v.

NATHA.

Before Mr. Justice West.

April 19.

SANKAPPA BASAPPA Applicant v. BASAPPA
IRAPPA Opponent. *

Small Cause Court—Jurisdiction—Damages for malicious prosecution.

A suit for less than Rs. 500 for damages for imprisonment and malicious prosecution is cognizable by a Small Cause Court.

This is an application against the Order of C. F. H. Shaw Esquire, District Judge of Belgaum, in Regular Appeal No. 145 of 1878.

When this case came first before this Court the complaint made by the defendants was that the Subordinate Judge had improperly received and dealt with it under the power of a Judge of the Small Cause Court vested in him under Act XIV of 1869. On this ground we were asked to set aside his judgment. But it was clear that the Subordinate Judge had jurisdiction over the cause, whether it was within the definition of Act XI of 1865 a small cause or not. Jurisdiction, therefore having been exercised it was to be referred to the authority under which this could legally be done, and so

* Extra. Application 140 of 1879 (P. 106 of P. J. 1880.)

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assuming in favour of the applicant that the case was not a small cause, we declined to set aside the judgment, because in ordinary cases the defendant's remedy was by appeal to the District Court.

On this the defendant went to the District Court where the District Judge has now rejected his appeal, on the ground that the case is one under the Small Cause Court jurisdiction. The Defendant seeks to have this order set aside as opposed to the previous order of the High Court. What the District Judge puts forward as reasons for his decision are, it must be conceded, not altogether satisfactory. If he thought this Court had absolutely decided that the case was not a small cause, and that an appeal must be made to the District Court, his duty was simply to act on that decision. What he says about the heading of the plaint or any other document in the case is nothing to the point, for this reason that the Court is one and the same whether the Subordinate Judge is trying a small cause or any other cause, and its jurisdiction is not affected by any surplussage of title given in any paper. It is only with reference to appeal and the possibility of an appeal that a difference arises in the mode of recording the evidence which necessitates a consideration from the first of the character of a suit for less than Rs. 500. In short, it is not the designation given to the Court, but the character of the suit itself which determines to what class a case belongs. In the present instance the suit is, according to the decision in *Ganga Narain Moytro vs. Gndadhur Chowdhry* (1) and followed in *Mansing Lalung and another vs. Theram Doloye and others* (2), a small cause. The plaintiff sued for damages for imprisonment and malicious prosecution, attended with pecuniary loss to him. This seems to have been the opinion of the District Judge also, if we have been able correctly to apprehend his meaning. He was right, therefore, in rejecting the appeal, as no appeal lay, and we must discharge the rule with costs.

(1) 18 C. W. R. 435.

(2) 22 C. W. R. 395.



*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Melvill.*

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June 7.

**MOTIRAM SUKRAM (plaintiff) Appellant v. MAYA-
RAM BARKATRAM (defendant) Respondent.***

Hindu Law—Inheritance—Son of step daughter of widow.

The son of the daughter of the husband of a deceased widow by a co-wife is her heir although she survived her husband where her marriage has been in one of the approved forms.

This is a second appeal from the decision of S. H. Phillpotts Esquire, District Judge of Ahmedabad, in Appeal No. 41 of 1878.

The Court, on the following authorities :—Mitaksharah, inheritance, Chapter II, S. XI, pl. 11 Mayukha, Chapter IV, S. X. pl. 28; West and Buhler, 2nd Ed., pp. 224 *et seq.*—is of opinion that Mayaram Barkatram, as son of the daughter of the husband of the deceased Harkore by a wife other than Harkore, is the heir of Harkore, although she survived her husband.

The Court, in the absence of evidence to the contrary, has assumed (the parties being Brahmans) that the marriage of Harkore and her husband was in one of the four approved forms.

Decree of District Judge affirmed with costs.

Before Mr. Justice Melvill and Mr. Justice Kembell.

June 7.

**HARI BHIKAJI (defendant) Appellant v. NARO
VISHVANATH (plaintiff) Respondent. †**

Res judicata—Decree by consent.

Where a decree has been passed by consent of the plaintiff and one of the defendant's in a suit, which decree expressly binds another defendant who is represented by the same pleader as the consenting defendant and such other defendant takes no steps to set aside the decree, such decree, so long as it remains unreversed and unaltered, operates as *res judicata* so as to bar another suit by that other defendant against the plaintiff in the former suit in respect of the same subject matter.

This is a second Appeal from the decision of C. B. Izon, Esquire District Judge of Ratnagiri, in Cross Appeals Nos. 280 and 283 of 1878.

* S. A. No. 60 of 1880 (P. 119 of P. J. 1880.)

† S. A. No. 23 of 1880 (P. 121 of P. J. 1880.)



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Before this Court the respondent's pleader has relied on a decree (Exhibit 49) obtained by respondent's father against the appellant. As that decree awarded to the respondent's father the very property which the respondent now claims, it would appear that the respondent's proper remedy was to execute that decree, and not to bring the present Suit. But independently of this consideration, which does not appear to have been pressed on the Courts below, it seems that there is another decree (Exhibit 87) in a suit in which the present appellant was plaintiff, and the present respondent and others upon a consent entered into between the plaintiff and the first defendant in that suit. The present respondent was the third defendant in that suit, and it is contended that he is not bound by the decree, inasmuch as there is nothing to show that he consented to it. As he was represented in the suit by the same pleader who appeared for the first defendant, and as he must have been aware of the decree, and took no steps to have it set aside, it may be presumed that it was made with his consent. But assuming that it was passed without his consent, we must still hold that, so long as the decree remains unreversed or unaltered, it is binding upon the respondent he having been a party to the suit, and having expressly been made subject to the decree. For these reasons, we consider that the subject-matter of the present claim must be regarded as *res judicata*, and we accordingly reverse the decrees of the Courts below, and reject the claim, with costs on the plaintiff throughout.

June 9.

Before Sir Michael and Mr. Justice Melvill.

BIJAGIRTHIBAI, guardian of her minor sons BABU-
RAV GANGADHARRAV and others (opponent)
Appellant v. SADASHIV VENKATESH
(Applicant) Respondent. *

Hindu Law—Self-acquired property—Pleader's gains.

Where three brothers, pleaders, carry on their profession, in three different places, there is some *prima facie* improbability that they have done so jointly, though they may have had undivided family property and a Court should not consider as conclusive a statement to that effect

* Appeal No. 11 of 1879 (P. 126 of P. J. 1880.)

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made to the Licence Tax commissioner by one of such brothers 1880
since deceased, especially where the rights of minors are concerned ; **BHAGIRTHIBAI**
but should look for further evidence. **v. SADASHIVRAY.**

This is an appeal against the order of C. F. H. Shaw Es-
quire, Judge of Belgaum, in Miscellaneous Application No.
42 of 1879.

The District Judge has, upon Exhibit 15, (the petition of Gangadhar to the License Tax Commissioner), held that Gangadhar has not any self-acquired estate. This Court while holding that Exhibit 15 was admissible as evidence, is, however, far from satisfied that the statements in that petition are true, and is certain that the petition ought not to be regarded as *per se* conclusive of the fact that Gangadhar had not any self-acquired property. Although three brothers may have had undivided family property, there is some *prima facie* improbability in their respectively carrying on the profession of pleaders in three different places jointly, which improbability ought (especially where the rights of minors are concerned) to render a Court very cautious in accepting as true statements to that effect, where such statements may very possibly have been made to deceive a revenue officer. Further evidence should be looked for as to whether such professional business has been carried on jointly. The books and accounts and correspondence of the brothers should be called for and carefully examined, for the purpose of ascertaining whether their professional incomes were blended so as to form a common fund and were drawn upon indiscriminately by all three brothers, and whether those books &c. &c. afforded any other satisfactory evidence of such a community of professional incomes. This Court would refer the learned District Judge to *Dhanukdaree Lal vs. Ganput Lal* (1) and to the approbatory remarks of H. M.'s Privy Council upon that case in the recent Madras case *Pouliem Valoo Chetty vs. Pauliem Soorya Chetty* (2). The question as to whether or not Gangadhar had self-acquired property has not been sufficiently investigated, and this Court now refers it to the learned District Judge to make such an inquiry in-

(1) 10 Cal. R. 122, Civ. Rul.

(2) Ind. L. R. 1 Mad. 252, 261, 262 ; S. C. L. R. 4 Ind. App. 109, 118.



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to that question as above indicated and to report his finding thereon to this Court within three calendar months from receipt of this order and the evidence on which such finding is supported. Any further evidence which may be necessary in addition to that already recorded should be taken by the District Judge.

This Court reserves all other matters in this appeal for further direction on the return of the said report.

June 10.

Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

MORO RAMCHANDRA (defendant) Appellant v
GANESH LAKSHMAN (plaintiff) Respondent.*
*Estoppel, by decree—Agreement by mortgagor to redeem
and sell—Compromise of redemption suit—Suit by
purchaser to redeem.*

A. a mortgagor, executed an instrument purporting to convey one-half of the mortgaged property to the plaintiff, and agreeing to redeem the mortgaged, estate and to deliver possession of a moiety to the latter, and in pursuance of such a provision instituted a redemption suit, which, however he compromised and the suit was dismissed under S. 98 of Act VIII of 1859. The plaintiff then brought a suit against the mortgagee alone to redeem.

Held that the plaintiff was estopped by the proceedings of A., which were instituted by him as the plaintiff's agent and with his consent, the plaintiff not having shown that A. was not also his agent for carrying them through.

This is a second appeal from the decision J, L. Johnstone, Esquire, Acting Assistant Judge of Ratnagiri, in Appeals Nos. 84 and 92 of 1878.

On the 29th November, 1865, Balambhat mortgaged an estate to Moro, the defendant in this suit, and placed him in possession. The mortgage was made with the consent of Lakshmibai, who had an interest in the property.

On the 12th November, 1866, Balambhat, with the consent of Lakshmibai, executed an instrument (Exhibit No. 3) which purports to be a conveyance of a moiety of the same estate to Ganesh, the plaintiff in the present suit. This instrument contains the following provision : " The said *khata* " is held in mortgage by Moro Ramchandra Desai. He does

* S. A. No. 14 of 1880 (P. 127 of P. J. 1880.)



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"not allow his mortgage to be paid off, without raising difficulties. I am taking steps to sue him and to redeem khata. When it is redeemed from him, I will allow you to give the kabulayet for a moiety of the same khata, and will cause you to be put in possession of the said khata."

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In pursuance of the above provision, Balambhat, on the 7th January, 1867, instituted a redemption suit against Moro ; but he subsequently presented an application to the Court, in which he stated that he had come to a compromise with Moro, and did not wish to proceed with the suit. An order was in consequence made that the suit should be dismissed under the provisions of Section 98 of Act VIII of 1859.

In 1869 the present plaintiff brought a suit against Balambhat, Lakshmibai, and Moro, in which he claimed a moiety of the estate, alleging that Moro's mortgage had been paid off in full by Balambhat and Lakshmibai. He obtained a decree in his favour in the Court of first instance ; but in appeal, his claim was rejected, on the ground that he had failed in proving that Moro's mortgage had been satisfied. This decree was affirmed in special appeal.

The plaintiff has now brought the present suit against Moro alone, and prays that he may be allowed to redeem the whole estate on payment of such moneys as may be found due upon the mortgage.

The questions which we have to consider are the meaning and effect of the so called deed of sale, Exhibit 3, and the effect upon the present suit of the previous legal proceedings taken by Balambhat and the plaintiff.

Exhibit 3 is very unscientifically drawn ; but it is difficult to construe it as anything more than an agreement on the part of Balambhat to redeem the whole estate from Moro and thereupon to convey to the plaintiff, and put him into possession of half the estate. If this be a correct interpretation of the document, the plaintiff's proper remedy was a suit for specific performance of the agreement. And this, in fact, appears to have been the interpretation which the plaintiff in the first instance put upon the agreement, and this was the remedy to which he had recourse. He allowed

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Balambhat to bring the redemption suit, and then he himself brought a suit, which was of the nature of a suit for specific performance against Balambhat and Lakshmibai, Moro being joined as a party because he was in possession of the property, and refused to give it up. Unfortunately for the plaintiff, he misstated the facts, or attempted to prove more than he was able to prove. He staked his success upon the allegation that Moro's mortgage had been paid off in full ; and being unable to establish this, he failed in his suit. Had his prayer been that Balambhat and Lakshmibai might be ordered to pay, and Moro to receive, whatever might be found due on the mortgage, and that thereupon Balambhat and Lakshmibai might be ordered to convey to him one-half of the estate, he might perhaps have succeeded ; though, even in that case, he would have been met by the difficulty that Balambhat had already brought a redemption suit and that that suit had been dismissed.

Having failed in his suit for specific performance, the plaintiff now puts a different interpretation on Exhibit 3, and seeks a different remedy. He treats Exhibit 3 as an immediate conveyance to him of one-half of the estate, or at least as creating him a co-parcener in the equity of redemption ; and upon the strength of this interest he sues to redeem the whole property. Assuming that such an effect can be given to Exhibit 3, we do not see how the plaintiff can free himself from the estoppel created by the redemption suit brought by Balambhat in 1867. Exhibit 3 provided that Balambhat should be the person by whom the property should be redeemed : and without saying that this provision would have deprived the plaintiff of his right of bringing a redemption suit, if he had acquired any immediate right to the equity of redemption, it is still perfectly clear that the redemption suit, which was actually brought, was brought by Balambhat with the plaintiff's consent and as the plaintiff's agent. If that be so, how can the plaintiff escape the conclusion that he is bound by the result of Balambhat's suit ? The result of that suit was that an order was made by which Balambhat would be incapacitated from bring another redemption suit. On what

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grounds can the plaintiff say that he does not labour under the same incapacity? No ground has been alleged to us, except that the plaintiff was not a party to Balambhat's suit. But if Balambhat brought the suit with his consent, and for his benefit, he was to all intents and purposes represented by his co-parcener. It has been suggested to us, in the course of argument, that Balambhat had no power to compromise the suit, so as to sacrifice the plaintiff's interest, and that the compromise must have been the result of collusion between Balambhat and Moro. There is certainly no evidence to show what the nature of the compromise was; but it does not appear that the plaintiff has ever hitherto alleged fraud or collusion between Balambhat and Moro. On the contrary, in his suit of 1869, he seems to have adopted the compromise whatever it was; for the case which he made, and which he laboured to establish, was that Moro had been satisfied by Balambhat, and that Moro had no further claim upon the property. But at any rate, it is for the plaintiff to show that Balambhat, who was his agent for bringing the redemption suit, was not also his agent for carrying it through, and in the absence of any proof, or even any allegation, of the kind, we must hold the plaintiff bound by Balambhat's acts, and by the decree made against Balambhat.

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v.
GANESH.

For these reasons we think that the plaintiff is estopped from bringing the present suit, and we, therefore, reverse the decrees of the Courts below, and reject the claim, with all costs on the plaintiff throughout.

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Justice F. D. Melvill.*

June 15.

RAMRAV and VISHNU BHAGWANT Applicant v.
RAMJI KRISHNAJI and others Opponents, *

Costs—Stranger to record—Extraordinary jurisdiction.

An Appellate Court cannot make an order directing some of the defendants, who are not parties to the appeal, to pay the plaintiff's costs. The High Court will interfere under its extraordinary jurisdiction to set aside such order.

* Extra. Application 115 of 1879 (P. 129 of P. J. 1880.)



1880

RAMRAV
v.
RAMJI.

This is an application against the decree of W. H. Newnham, Esquire, Judge of Poona, in Regular Appeal 128 of 1877.

This Court directs that so much of the decree of the District Judge of the 29th August, 1877, in the appeal to the District Court, No. 128 of 1877, as directs the defendants 1 and 2, that is to say, the defendants Ramrav Bhagwant and Vishnu Bhagwant, to pay to the plaintiff his costs, be cancelled, as having been made by the District Judge without jurisdiction, inasmuch as the said defendants Ramrav Bhagwant and Vishnu Bhagwant were not parties to the said Appeal, No. 128 of 1877, and were not served with notice thereof, and the said order to those defendants to pay the plaintiff's costs was made in their absence and without giving the said defendants last mentioned any opportunity of being heard against the same. And this Court further orders that the defendants 3 and 4, that is to say, the defendants Narsingdas Raghunathdas and Krishnaji Bhavrav, do pay to the plaintiff and to the defendants 1 and 2 their costs of the present application, inasmuch as the defendants 3 and 4 improperly and insufficiently constituted their said Appeal No. 128 of 1877, as to parties, by not making the said defendants Ramrav Bhagwant and Vishnu Bhagwant parties thereto, and made such a statement in paragraph No. 5 of the Memorandum of Appeal as induced the District Judge to make the said order as to costs.

June 16.

Before Mr. Justice Melvill and Mr. Justice Kemball.
MULCHAND HUKAMCHAND Applicant v. PANDU
VITHU Opponent. *

Execution decree—Duty of Court executing decree—Altering or varying decree—Decree for sale of mortgaged property—Stay of sale.

Where a decree empowers the mortgagee to sell the mortgaged property in default of payment by the mortgagor within a limited time, the Court cannot make an order staying the sale on the mortgagor making a payment and giving security for the balance. Though the mortgagee may not have appealed against such order, it is still open to him to object to it, on an application by the mortgagor to set aside a sale

* Extra. Application No. 14 of 1880 (P. 131 of P. J. 1880.)



which has been held in consequence of his alleged failure to comply with his order.

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MULOHAND
v.
PANDU.

This is an application against the order of E. Hosking, Esquire, Assistant Judge F. P., at Nasik, dated the 16th January, 1880, in Miscellaneous Appeal No. 2 of 1879.

The original decree in favour of the petitioner was made on the 15th June, 1877, and empowered him to sell the mortgaged property, in default of payment by the mortgagor within one month of the sum of Rs. 3,300 and costs. The order made by the Subordinate Judge on the 7th March, 1878, that the sale of the property should be stayed upon the mortgagor paying Rs. 150, and giving security for the payment of annual instalments of Rs. 500, was wholly inconsistent with the terms of the decree, and was an order which it was not competent to the Subordinate Judge to make. It is true that the mortgagee did not appeal against this order; but that was because the sale did in fact take place, in consequence of the failure, or supposed failure, of the mortgagor to comply with the order. When the question of setting aside the sale is raised by the mortgagor, on the ground that the order for staying the sale has been contravened, it is open to the mortgagee to show that the order for staying the sale was one which could not legally be made. We are clearly of opinion that that order was illegal, and consequently, that the order of the Assistant Judge, setting aside the sale as made in contravention of the subordinate Judge's order, was also illegal. We, accordingly, reverse the order made by the Subordinate Judge on the 7th March, 1878, and also the order made by the Assistant Judge on the 16th January, 1880.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

June 28.

NAGAPPA NAIK Masti Naik (defendant) Appellant v.
SHIVRAM VISHWANATHBHAT (plaintiff)
Respondent.*

Practice—Objection not raised in Courts below—Enhanced assessment, liability for.

Where a defendant in a suit by a *Mulvargadar* to recover enhanced rent, has put in a written statement which has been construed by the

* S. A. No. 80 of 1880 (P. 142 of P. J. 1880.)



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SHIVRAO.

Lower Courts as admitting his liability and only questioning the amount of enhancement to which he was liable and has allowed the case to go to trial on the single issue as to that amount, he will not be allowed on second appeal, to turn round and say that the proper issue would have been whether he was liable at all.

This is a second appeal from the decision of A. I. Spens, Esquire, District Judge of Kanara, in Appeal No. 48 of 1879.

The lease under which the defendant holds has not been given in evidence, and we do not, therefore, know whether its terms are similar to those of other leases, in regard to which we have reluctantly held in several cases that the Malavargdar cannot recover enhanced rent from the Mulgainidar : Babshetti *vs.* Venkatramana (1) ; Ramcrishna *rs.* Narshiva (2) ; Ranga *rs.* Suba Hegde (3). In the present case both the lower Courts have found that the defendant has in his written statement admitted his liability to pay the enhanced assessment whatever it may be ; and finding that the plaintiff has proved that the enhanced assessment is Rs. 24, as stated in the plaint, they have allowed the claim in full. If we had to decide this question solely upon the defendant's written statement, we might find some difficulty in treating it as an unequivocal acknowledgment of liability. The defendant commences by saying that there was no agreement by which he was bound to pay the enhanced assessment, and that the khatedar is the person liable for such assessment ; but he then goes on to say that the amount by which the assessment had been enhanced is Rs. 8, and not Rs. 24, as alleged by the plaintiff, and that, therefore, he (the defendant) is only liable for Rs. 8, and not for Rs. 24, in addition to his stipulated rent. It is difficult to reconcile these two statements, and it would have been well if the Subordinate Judge had examined the defendant and ascertained his exact meaning. However, it is certain that the Subordinate Judge understood that the defendant admitted his liability to pay the enhanced assessment, whatever it might be, and that the only question between the parties was as to the amount of the enhancement. It is equally certain that the defendant acquiesced in this interpretation, and allowed the case to go to trial on this understanding. The only issue (except one of limitation

(1) 3 Bom. 154. (2) 4 Bom. 478. (3) 4 Bom. 473.

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which the Subordinate Judge laid down was " what was the
" old assessment, Rs. 24 or Rs. 8 ? " and he has stated on
the record that no other issue was asked for by the parties.
We think, having regarded to the conduct of the defendant,
that the interpretation which the Subordinate Judge put up-
on his written statement was the interpretation which the
defendant himself intended it to bear ; and we cannot per-
mit the defendant, after he has allowed the case to go to
trial on a single issue as to the amount of enhancement for
which he is liable, to turn round and argue that the proper
issue would have been whether he is liable at all. There is
no doubt that in justice the enhanced assessment ought to fall
upon the tenant, and not upon the landlord ; and, as we have
already remarked, it has been with reluctance that this
Court has in other cases held that the landlord is unable to
recover. In the present case, the admission and conduct of
the defendant relieves us from the necessity of interfering
with the decrees of the lower Courts, and those decrees are
accordingly confirmed with costs.

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NAGAPPA
v.
SHIVHAM.

Before Mr. Justice Kemball and Mr. Justice F. D. Melvill.

June 17.

RAJARAM BHOSLE alias ABASAHEB MAHARAJ
Applicant v. YESHWANT SAKHARAM
Opponent. *

*Jurisdiction—Sirdar of the Deccan—Subordinate Judge
with powers of Small Cause Court.*

A First Class Subordinate Judge invested under Act XIV of 1869 with
the jurisdiction of a Judge of a Court of Small Causes, is not a Court
of Small Causes constituted under Act XI of 1865, and cannot entertain
a suit against a First Class Sirdar of the Deccan.

This is an application against the decree of Rav Bahadur
Purshotam Sidheswar Biniwale, First Class Subordinate
Judge and Judge of the Court of Small Causes at Satara, in
Original Suit No. 737 of 1878.

This is an application for the exercise of this Court's ex-
traordinary jurisdiction. A rule *nisi* was granted on the
26th February last and the matter has been argued this day
It appears that a suit was brought in the Court of the

• Extra. Application No. 15 of 1880 (P. 145 of P. J. 1880.)

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**RAJARAM
v.
YESHWANT.**

First Class Subordinate Judge at Satara, who had been invested with Small Cause Court powers under the Bombay Civil Courts' Act to recover originally against four village officers the amount claimed as being the balance of a cash allowance which had fallen into arrears. By direction of the Court, the plaintiff applied to have the Inamdar of the village, who is a Sirdar of the First Class, added as a defendant. This was done, and at the conclusion of the trial the Subordinate Judge, in the exercise of his Small Cause Court Jurisdiction, made a decree in the plaintiff's favour directing that the fifth defendant *i. e.*, the Inamdar, should pay the money claimed, and that the other four defendants should abstain from offering any obstruction.

Three objections have been taken to the said decree so far as it affects the 5th defendant : 1st, that the applicant as a First Class Sirdar is not amenable to the jurisdiction of the First Class Subordinate Judge exercising Small Cause Court powers ; 2nd, that the suit as against him did not come within the provisions of Section 6, Act XI of 1865, and, 3rd, that the Court of the First Class Subordinate Judge is not a Court established under Act XI of 1865.

The question of jurisdiction turns on whether a Civil Court invested under Act XIV of 1869 with the jurisdiction of a Judge of a Court of Small Causes is a Court of Small Causes constituted under Act XI of 1865. It is admitted that suits against persons of the applicant's rank do not come under the jurisdiction of the Civil Courts (see Reg. XXIX of 1827 and Sections 7 and 11., Act X of 1877), but Section 11 Act X of 1877, does not extend (vide the second Schedule to the Act) to Courts of Small Causes constituted under Act XI of 1865, so that the general jurisdiction of Small Cause Court thus constituted is not affected by the saving of Regulation XXIX of 1827. It is contended in showing cause against the rule that, as the jurisdiction of a Subordinate Judge invested with Small Cause powers under Act XIV of 1869 is defined by Act XI of 1865. he is, therefore, invested under the latter Act, and his Court becomes a Court constituted thereunder ; but the matter scarcely admits of argument. The Subordinate Judge's Court is clearly constituted under Act XIV of 1869, and the fact that the Subordi-



Subordinate Judge invested with Small Cause powers within a certain amount cannot possibly affect the constitution of his Court. It has been frequently held that Sirdars exempted under Reg. XXIX of 1827 are not privileged from the jurisdiction of a Court of Small Causes constituted under Act XI of 1865 when residing within its jurisdiction; but the jurisdiction over them of the ordinary Civil Courts being specially barred, we must hold that the First Class Subordinate Judge at Satara had no authority to try the suit against the applicant, and must, therefore, as against him, set aside the entire proceedings.

Why the Subordinate Judge took upon himself to direct the making of the application which resulted in the Sirdar being made a party, it is difficult to conceive. The suit was for money had and received; there was no allegation that the money had found its way into the Sirdar's hands, and there was nothing before the Subordinate Judge, so far as we can learn, to justify his being made a party. The plaintiff has pointed out to us that his decree as against the other defendants is under the circumstance of no value, and has asked us to send the case down with directions to amend the decree; but his proper course is to apply for a review, and we have little doubt that his application will receive due consideration.

Rule made absolute with costs.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

June 29.

NANABHAI VALABHDAS Appellant v. NATHABHAI HARIBHAI Respondent.*

Hindu Law—Partition—Account—Contribution.

Even where a partition is made, one co-parcener is not, as a rule, entitled to an account against another co-parcener in respect of payments made by the former; still less, while union continues, can one co-parcener claim contribution from another in respect of a single payment. Where the plaintiff, a member of an undivided Hindu family, had been for years harassing the defendant, his co-parcener, with such suits, the High Court in one such suit which was cognizable by a Small Cause Court, said that under the circumstances, it ought to exercise the power conferred by S. 622 of Act X of 1877, and hold the suit unsustainable.

• Appeal No. 11 of 1880 (P. 154 of P. J. 1880.)



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v.
NATHABHAI.

This is an appeal against the order of S. H. Phillpotts, Esquire, Judge of Ahmedabad, in Appeal No. 92 of 1878.

The objection that this is a case cognizable by a Court of Small Causes, and that therefore no appeal lies to this Court, was not taken by the respondent, until after the appellant had been heard. The objection is no doubt in itself a good one—*Hari vs. Aba Saheb* (1): but considering all the circumstances of the case, we are of opinion that we ought, even in the absence of an appeal, to interfere under the powers vested in us by Section 622 of Code of Civil Procedure. The parties are co-parceners, and have been litigating for years in respect to the undivided family property. In the case reported at 7 Bom. H. C. R., p. 46 they were told that their proper remedy was by a suit for partition; but to this remedy they refuse to have recourse. Instead of doing so, the plaintiff harasses the defendant by annual suits for contribution in respect of the Government assessment paid by the plaintiff on account of one of the fields, belonging to the family, which stands in the plaintiff's name. The plaintiff, we are told, obtained a decree in his favour in a suit brought in the year 1874: and in the present suit, the District Judge, reversing the decree of the Subordinate Judge, has remanded the case for a decree to be made in regard to the assessment paid in subsequent years. Unless we interfere, the same course of litigation may be pursued indefinitely. We are of opinion that the Subordinate Judge, in the present case, was right in his view of the law, and that the District Judge was in error in reversing his decision. The fund out of which the plaintiff paid the assessment, was, in theory, the property of all the co-parceners, and the plaintiff cannot predicate of it that it belonged exclusively to himself. Even when a partition is made, one co-parcener is not, as a rule, entitled to an account against another co-parcener in respect of payments made by the former; still less, while union continues can one co-parcener claim contribution from another in respect of a single payment. In our opinion the present suit cannot be maintained; and we accordingly, reverse the order of the District Judge, and restore the decree of the Subordinate Judge, with costs on plaintiff throughout.

(1) 4 Bom. 321.



*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice F. D. Melvill.*

1880

July 6.

GURLINGAPA BHIMAPA (defendant 2) Appellant
v. GURAPA APANA, deceased, by his widow SHIV-
NINGAVA (plaintiff) and BASAPA, deceased,
by his daughters, GANGAVA and others, minors,
by their guardian the NAZIR of Court (De-
fendant No. 1) Respondents. *

**Executor of his own wrong—Account.*

An executor of his own wrong is fairly entitled to recover from the estate any sums which he may have paid for the benefit of the estate, if such sums would have been paid by a properly constituted administrator in a due course of administration.

This is an appeal from the decision of C. F. H. Shaw, Esquire, Judge of Belgaum, in Original Suit No. 3 of 1879.

Gurlingapa, as an executor of his own wrong, has properly been made liable to the plaintiff. But even as an executor of his own wrong, he is fairly entitled to recover from the estate any sums which he may have paid for the benefit of the estate, if such sums would have been paid by a properly constituted administrator in a due course of administration. As all the parties are before this Court, it thinks that the questions between them may equitably be adjusted in this suit, without obliging Gurlingapa to have recourse to another action. This Court, therefore, requires the District Judge to find, after taking such evidence as may be offered, on the following issue, viz :—

Whether Gurlingapa has proved that at the date of the mortgage by Exhibit No. 3, the following sums were due by Basapa's estate, viz : Rs. 375 to Gangadar Shivram, under the bond, Exhibit No. 4 ; Rs. 188 to Lakshman Sugtankar under the bond, Exhibit No. 5, and Rs. 26-11 to Shankarrav Bhau under a decree, by virtue of which an attachment had been placed on the house which is the subject of this suit ; and, if so, whether the whole, or any and what part of the said debts was paid by Gurlingapa to the said Gargadar, Lakshman and Shankarrav.

• Appeal No. 15 of 1880 (P. 158 of P. J. 1880.)



~~1886~~
July 6.

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice F. D. Melvill.*

**The Collector of Surat (defendant) Appellant v. NASAR-
VANJI DARASHA et al (plaintiffs) Respondents.***

*Bom. Act IV of 1868, S. 11—" All roads and lanes "—
Highway—Public Road—Title to soil—Dedication
to public.*

The words " all roads and lanes " in S. 11 of Bombay Act IV of 1868 mean all roads and lanes which have been dedicated to the public, and do not include private roads and lanes which have not been so dedicated. If roads or lanes in a town or city have been dedicated to the public, they, by that section, vest in Government, and a former private owner of the soil over which such road or lane passes cannot be regarded as any longer the owner of so much of the soil as is occupied by the road.

Dedication to the public may be express or implied. The most common mode in which a highway is supported, as being such, is by prescription. If all persons without distinction have indiscriminately for a considerable space of time, without interruption, used and enjoyed a way, such way will be presumed to be a high way.

This is a second appeal from the decision of H. Birdwood, Esquire, District Judge of Surat, in Appeal No. 111 of 1877.

The words " all roads and lanes " contained in Section 11 of Bombay Act IV of 1868 appear to this Court to mean all roads and lanes which have been dedicated to the Public, and do not include private roads and lanes which have not been so dedicated. If roads or lanes in a town or city have been dedicated to the Public, they, by virtue of the express legislation of that Section, " vest in Government," and if they vest in Government a former private owner of the soil over which such road or lane passes cannot since Bombay Act IV of 1868 came into force, be regarded as any longer the owner of so much of the soil as is occupied by the road. Dedication to the Public may be express or it may be implied. It has not been contended here that there was any express dedication of the road in question to the use of the Public. But it has, on behalf of the defendant, the Collector of Surat, been contended, and the Assistant Judge

* S. A. No. 6 of 1880 (P. 159 P. J. 1880.)



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has in substance found, that the road has by implication been fully dedicated to the Public, *i. e.*, that the Public generally has from time immemorial been permitted by the plaintiffs and their ancestors with carts, horses and on foot without hindrance to use and pass over the road ; but it is not distinctly found by the District Judge whether or not the Public has had such user of the road as described by the Assistant Judge. " The most common mode in which a " highway is supported, as being such, is by prescription. If " all persons without distinction have indiscriminately for " a considerable space of time, without interruption used " and enjoyed a way, such way will be presumed to be a " highway " : 2 Burn's Justice, Title Highway, 30th Ed. p. 977.

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OF SURAT.
NARAYANJI.

Having regard to the foregoing observations, the Court directs the District Judge, upon the evidence already taken to try the following issue, viz :—" Is the road mentioned in " the judgments of the Assistant and District Judges a " public road," and to report his finding thereon within two calendar months after he has received this order. The Court reverses all further directions and costs.

Before Mr. Justice M. Melvill and Mr. Justice Kamball.

July 14.

EDALJI MANCHERJI (plaintiff) Appellant v. MA .
HAMAD AMANJI *et al* (defendants) Respondents. *

Bhagdari tenure.

An allegation by the defendants, who cultivated land admittedly included in the plaintiff's *bhag*, that they held independently of the *bhagdar* and as tenants of the Government, paying assessment, and assessment only to the Government is inconsistent with the tenure of a *bhagdari* village. If not inferior *bhagdars*, they must, from the constitution of *bhagdari* villages, be treated as *ganotias* or tenants, and liable to pay rent to the *bhagdar*.

This is a second appeal from the decision of G. Druitt, Esquire, Acting Assistant Judge of Surat, in Appeal No. 86 of 1877.

The judgment of the Assistant Judge (which is greatly confused, as Mr. Druitt's judgments generally are, by the use of the words ' plaintiff ' instead of ' defendant ' and ' de-

* S. A. No. 12 of 1880 (P. 167 of P. J. 1879.)

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defendant' instead of 'plaintiff') is barely intelligible, and certainly cannot be taken as reasons for reversing the carefully considered judgment of the Subordinate Judge. The law contended by the defendants is admittedly included in the plaintiff's obligation. The defendants' case is that they hold independently of the bhagdar, and as tenants of Government, paying assessment, and assessment only, direct to Government. Such an allegation is inconsistent with the tenure of a bhagdari village, *Ruji Narotam vs. Purshotam* (1), and in the present case is contradicted by the evidence of the accounts, which show that the defendants and their predecessors in title, have sometimes paid more, and sometimes less than the Government assessment due upon these lands; the excess in the one case being credited to the bhagdar, and the deficiency in the other case recovered from the bhagdar. The defendants' pleader before us admits that this has been the case, and can give no explanation other than that which naturally results from the circumstance mentioned, viz: that the defendants are the tenants of the bhagdar. The only valid defence which the defendants could have set up would have been that they were themselves inferior bhagdars; but this defence they have not attempted to make. If they are not inferior bhagdars, they must, from the constitution of bhagdari villages, be treated as *Ganotias*, or tenants, and held liable to pay rent (*ganota*) to the bhagdar. The Subordinate Judge has held that they are liable to pay custom and rent only; and as the plaintiff did not appeal against this decision, it is unnecessary for us to consider whether a bhagdar's claim against a *ganotia* can properly be so limited. It is sufficient to say that the plaintiff is entitled to recover from the defendant at least so much rent as has been awarded by the Subordinate Judge; and the Assistant Judge's judgment is accordingly reversed and that of the Subordinate Judge restored. The defendants to bear the costs of appeal in this Court and the Court below.

(1) 2 B. H. C. R. 231.



Before Mr. Justice M. Melvill. and Mr. Justice Kimball.

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BAI GANGA, deceased, by her heir, TRIMBAKLAL PRANJIVAN and KRISHNAVALABH BIJUBHAI (plaintiffs) Appellants v. JAGJIVANDAS and others (defendants) Respondents. *

July 20.

Parties to suit for rent—Adverse possession.

Where in a suit for rent, it appears that the defendant has not entered under a lease from the plaintiff, but under one executed by a deceased person, whose heir a third person claims to be and as such to have received and to be entitled to receive the rents, such third person is a proper and necessary party to the suit; and if it should appear that he has had adverse possession as against plaintiff for 12 years before he was made a party, the plaintiff will be precluded from proving his title as against him, and consequently cannot recover a decree against them may not have been barred by time.

This is a second appeal from the decision of G. Druitt, Esquire, Acting Assistant Judge of Surat, in Appeal No. 132 of 1877.

This suit was originally brought to evict Umar and Jabar, on account of non-payment of rent. The defence was that Umar and Jabar were the tenants, not of the plaintiffs, but of Jagjivandas, who was thereupon made a party to the suit. The Courts below have held that the suit is barred by lapse of time.

We concur in this decision, though for reasons somewhat different from those on which the lower Courts proceeded. Umar and Jabar did not enter under a lease from the plaintiffs, but under one executed by their grandmother Javer Vahu's heir. Whether, after Javer Vahu's death, they become the plaintiffs' tenants, depended upon whether the plaintiffs were Javer Vahu's heirs. The plaintiffs could not have a decree against Umar and Jabar, until they proved that they were the heirs, and that Jagjivandas, to whom the tenants had attorned, was not entitled to the inheritance. The real contest was between the plaintiffs and Jagjivandas, both claiming the inheritance; and the plaintiffs could not evade this contest, by bringing a suit against the tenants, and ignoring Jagjivandas who was the party really in possession. If the plaintiffs could have obtained a decree against the te-

* S. A. No. 63 of 1880 (P. 170 of P. J. 1880.)



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nants, it would have been of no use to them, for, in attempting to execute it, they would have been resisted by Jagjivandas, and would have been forced to prove their claim against him. Under these circumstances, we think that it was right and necessary that Jagjivandas should be made a party to this suit : and that the issue of title, as between the plaintiffs and Jagjivandas, was properly treated as the issue upon which the case, if tried on its merits, would have to be decided. Unfortunately, however, for the plaintiffs, Jagjivandas had, on the date on which he was made a defendant, been for more than twelve years in adverse possession of the land. Umar and Jabar executed a rent-note to Jagjivandas on the 5th July, 1863, and the order for making him a party was not passed till the 23rd July, 1875. The plaintiffs are consequently precluded by lapse of time from proving their title against Jagjivandas ; and, this being so, they cannot have a decree against Umar and Jabar, although it may be that, on the date on which they sued them, their action was not barred by limitation.

The decrees of the Courts below are confirmed with costs.

July 27.

Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice F. D. Melvill.

REMTULA VALUBHAI *et al* (defendants) Appellants
v. PANABHAI RANCHORDAS *et al* (plaintiffs) Respondents. *

Jurisdiction, Cause of action arising within—consignment of goods for sale in Siam through defendants' firm in Bombay.

Where the plaintiffs' firm in Ahmedabad sent goods to the defendants' firm in Siam through the defendants' branch firm in Bombay, and drew hundis in respect of such goods on the Bombay firm which were paid there to the plaintiffs' account. *Held*, that the cause of action in respect of monies due on account of a consignment of goods so made, arose in Bombay.

The consignment to Siam was made from Bombay and not from Ahmedabad, inasmuch as the goods would, for the purposes of such consignment, have been delivered to and accepted by the Bombay firm in Bombay, and the defendants' responsibility would thus begin in

* S. A. No. 116 of 1880 (P. 193 of P. J. 1880.)

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Bombay. And if the payments of the sale proceeds were ordinarily made as above described, the cause of action (if any) would arise in Bombay as in that case, the usual course of business would lead to the inference that the agreement between the parties was that the defendants should pay the proceeds of the goods sold in Siam over to the plaintiffs in Bombay.

This is a second appeal from the decision of A. L. P. Larken, Esquire, Acting Assistant Judge of Ahmedabad, in Appeal No. 23 of 1878.

Two points have been raised here, one of jurisdiction, the other whether the defendants (father and son) are partners. As to the first, it is admitted that the defendants do not reside or carry on business at Ahmedabad ; but the plaintiffs contended that the cause of action arose there. That question has not, as we think, been satisfactorily treated by the Assistant Judge (Mr. Larken). Upon it he says : " I am of opinion that the suit can be brought in the Court of the Subordinate Judge of Ahmedabad. The cause of action arose there, as it appears plain from the evidence that the mode of proceeding was for respondents to send goods to the firm in Siam through the Bombay firm. " Pausing there, we should observe that the consignment to Siam would appear to have been made from Bombay and not from Ahmedabad, inasmuch as the goods would, for the purposes of such consignment, have been delivered to and accepted by the Bombay firm in Bombay, and the defendants' responsibility would thus commence in Bombay. The Assistant Judge continues : " The Siam firm, having sold the goods, sent the money to the Bombay firm, and they, in their turn, forwarded it to the respondents in Ahmedabad. There is no doubt that this was the mode of procedure, and as a particular example may be noted the Rs. 1,000 paid by the appellants on respondents' hundi from Ahmedabad. There is therefore, fully sufficient evidence of a contract to pay respondents (plaintiffs) in Ahmedabad for the goods sent by them to Siam. " This is a remarkable *non-sequitur*. The particular example, so far from being an instance of payment of the proceeds of sale to the plaintiffs in Ahmedabad, is an instance of payment in Bombay. The plaintiffs in Ahmedabad drew a hundi for Rs. 1000 on the defendants' Bombay firm which hundi was paid by the latter in Bombay to the

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person who, either an agent or transferee of the plaintiffs, presented it for payment. The witnesses Nos. 49 and 50 give some vague evidence as to the proceeds of sale being customarily "sent" by the Bombay firm to the plaintiffs in Ahmedabad, but how it was sent is not stated by them. It scarcely seems likely that cash was sent to Ahmedabad. If those witnesses mean that the proceeds of sale were customarily received by the plaintiffs from the Bombay firm of the defendants, in the same way as the Rupees 1,000 mentioned by the Assistant Judge were received, the expression "sent to Ahmedabad" is erroneous and misleading, inasmuch as the payment would be a payment in Bombay and not in Ahmedabad. The mode of payment of the proceeds of sale of the plaintiffs' goods to the plaintiffs has not been sufficiently investigated in the lower Courts in order to admit of any satisfactory or safe conclusion as to the question whether the cause of action arose in Bombay or Ahmedabad. The question must be re-investigated on a new trial. If the payment of the proceeds of sale were ordinarily made in the same manner as the payment of the Rupees 1,000 above mentioned, the cause of action, (if any), would have arisen in Bombay and not in Ahmedabad, as, in that case, the usual course of business would lead to the inference that the agreement between the parties was that the defendants should pay the proceeds of sale of the goods sold in Siam over to the plaintiffs in Bombay.

The remaining question is whether the first defendant Rahimtulla was, in the matters, the subject of the plaint, the partner of his son, the second defendant Ahmedbhoy. The learned Assistant Judge conceived himself to be exonerated from going into that question because he said it had "already been settled in the affirmative in regular Appeal No. 26 of 1877 in the District Court." But that was not a decision between the same parties, and it does not follow that, because the defendant Rahimtulla failed there, he may not now be prepared with better evidence than he was then to show that he was not a general partner of his son. Again, assuming that he was a general partner, it may be that he was not a partner in the specific matters, the subject of this suit. That decree cannot be in any wise regarded as rendering the

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question of partnership *res judicata*. As an instance of the danger of accepting a decree between the defendants and other persons as concluding the question of partnership in this suit, we may mention that the defendants have produced here on appeal the certified copy of a decision of the Court of Small Causes in Bombay in a suit No. 23651 of 1877, wherein Narsey Valabji was plaintiff and the present defendants were defendants, in which it was ruled that Rahimtulla was *not* a partner of Ahmedbhoy. Neither that decision, nor that (Exhibit 51) in Regular Appeal No. 26 of 1877, can be regarded as deciding the question of partnership in this suit. It must be duly investigated in this suit in the same manner as if it had never been raised in the other suits. We observe that the Assistant Judge, while saying that the decree in Regular Appeal No. 26 of 1877 rendered it unnecessary to go into the question of partnership in this suit, added "although I must say that there is no evidence at all to show he (Rahimtulla) was not a partner, and every reason and presumption to suppose he was." As to this, it must be remarked that it lay upon the plaintiff to prove that the defendants are partners, and not on Rahimtulla to prove that he was not so; and the Assistant Judge's observation as to "every reason and presumption" is too vague to show whether or not that observation was rested upon evidence.

The officer of the Court, who prepared for the Assistant Judge the abstract of the plaint and written statements, which from the prefatory matter of his judgment, has most inadequately performed that duty. We there find the 6th paragraph of the written statement of the defendant Ahmedbhoy rendered thus: "That the plaintiffs had debited to his (defendant Ahmedbhoy's) accounts the sum of Rs. 1,000, but he (it?) had become due to him in respect of a hundi (cheque) for Rs. 2,300 passed to the plaintiffs from his firm at Bombay in Samvat 1929." That rendering is erroneous. The passage properly translated runs thus: "The plaintiffs have given credit for Rs. 1,000, but in the Samvat year 1929, Rs. 2,300 (have been paid) from the Bombay firm's shop to the plaintiffs in respect of (or by) hundies. The same monies are due from them." It is

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1880 evident that such abstracts of the pleadings should be revised
by a Judge before he adopts them as a part of his judgment.

RENTULLA
PARABHAI. For the reasons already given, we reverse the decree of
the Assistant Judge, and remand this cause for retrial on
the merits. Costs of the suit and both appeals must abide
the final result of the retrial.

July 26.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

SATAPA OMANA and others (defendants) Appellants
v. RAGHAPA DHARAPA (plaintiff) Respondent.*

*Parties to suit, objection as to—Title of person claiming
adversely, decision as to.*

Where no objection is taken to the introduction of a third person
into the suit and the parties went on trial, the lower Court ought to
have determined the question of title as between the plaintiff and the
person so introduced as a party.

This is a second appeal from the decision of C. F. H.
Shaw, Esquire, District Judge of Belgaum in Appeal No.
148 of 1878.

The District Judge has stated that “ the conflicting claims
“ of the defendants cannot be decided in this suit,” by which
he appears to mean that the issue is one between the plaintiff
and his tenants only, and that the question of title, as bet-
ween the plaintiff and Venkaji Balkrishna, cannot be deter-
mined. But the District Judge has nevertheless made a
decree against Venkaji, ordering him to deliver possession to
the plaintiff, and to pay mesne profits. Such a decree is illö-
gical, and inconsistent with the view taken by the District
Judge of the nature of the suit. The District Judge should
either have refused to make any decree against Venkaji on
the ground that he was improperly introduced into the suit,
or he should have determined the question of title, as bet-
ween the plaintiff and Venkaji. The latter course would,
under the circumstances, have been the proper one to pur-
sue : for no objection appears to have been made to the in-
troduction of Venkaji into the suit, and the parties went to
trial on the question of title ; and it is clear that a decree
against the tenants alone would be of no use to the plaintiff’

* S. A. No. 163 of 1880 (P. 198 of P. J. 1890.)

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who would be resisted by Venkaji when he went to execute it. The question of title, as between the plaintiff and Venkaji, must be decided, before the plaintiff can recover possession of the land : and the evidence bearing upon the question having been given in the present suit, it is right that the District Judge should decide it. The Court accordingly directs him to find on the following issue :—

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- Has the plaintiff proved his title to the land, as against Venkaji Balkrishna, and is he, as against him, entitled to recover the land.

Before Sir Michael Robberts Westropp, Kt., C. J. and
Mr. Justice F. D. Melvill.

July 28.

TUKARAM SHRIPATI (defendant) Appellant v.
BUDHO BHAVALA (plaintiff) Respondent.*

Alienation by guardian ad litem — Act VIII of 1859 S. 243.

A guardian *ad litem* of minors has no authority without the sanction of the Court under S. 243 of Act VIII of 1859 to mortgage the property of the minors derived by them from their father to secure the father's debt to the plaintiff, the subject of the suit against the minors.

This is a second appeal from the decision of Rav Bahadur Mahadev Govind Ranade, First Class Subordinate Judge of Khandesh at Dhulia with Appellate powers, in Appeal No. 184 of 1878.

This Court is of opinion that Bakshu, as one of the guardians *ad litem* of the infant sons of Krishna in the plaintiff's suit, had not authority, without the sanction of the Court under Section 243 of Act VIII of 1859, to mortgage the property of the minors, derived by them from their father Krishna, to secure the debt of Krishna to the plaintiff, the subject of his suit against the said minors. On the other hand, the sale to the defendant under the attachment in his suit against the minors as represented by their mother Supdi as their guardian *ad litem* was made at a mere nominal sum of eight annas in consequence of the existence of the mortgage given to the present plaintiff by Bakshu, which mortgage prevented the plaintiff from proceeding to obtain a sale under the attachment in his suit against Bakshu and Supdi as guardians *ad litem* of the minors. The decree and attachment in that suit were anterior to the decree and at-

* S. A. 207 of 1880 (P. 200 of P. J. 1880.)



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tachment in the defendant's suit. The plaintiff's suit too was instituted in 1876, and the defendant's suit in 1877. Under all of the above circumstances, and the pleaders of the respective parties not objecting, the most equitable course seems to us to be that we should reverse the decree of the First Class Subordinate Judge, and declare the mortgage by Bakshu to the plaintiff to be invalid, and set aside the sale to the defendant as illusory, and direct a new sale to be made of the property, the subject of this suit, and that the proceeds of such new sale should be divided between the plaintiff and the defendant in proportion to the amounts decreed to them respectively in the decrees in the said suits brought by them against the minors in respect of the debts of their father. The parties to this suit must bear their own costs thereof and of both of the appeals therein. The surplus proceeds of sale (if any) left after satisfaction of both of the said decrees to go to the minors.

August 4.

*Before Sir Michael Roberts Westropp, Kt. C. J. and
Mr. Justice F. D. Melvill.*

**GHANASHAM NARAYAN et al Applicants v. PANDU-
RANG NARAYAN deceased, his son ANTAJI**
Opponent. *

*Procedure—Counter claim—Set off—Refusal to decide
issue—Res judicata.*

Where a defendant, in answer to the plaintiff's claim, sets up a counter claim, not for an ascertained debt but for unliquidated damages, and therefore not the subject of a set off or counter claim under S. 121 of Act VIII of 1859 or S. 111 of Act X of 1877, the Court has no jurisdiction to decide on the issues raised in respect of such counter-claim; and if it refuses to do so, the defendant would not be barred by S. 13 of Act X of 1877, from bringing an independent suit in respect thereof.

This is an Application against the decree of C. B. Izon, Esquire, District Judge of Ratnagiri, in Appeal No. 372 of 1878.

It appearing to this Court that the counter-claim made by the present applicants Sitabai and Ghansham Narayan in the suit in which Pandurang Narayan was plaintiff and the present applicants were defendants was not a claim for an ascertained debt, but for unliquidated damages, and there-

* Extra. Application No. 27 of 1880 (P. 202 of P. J. 1880.)

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fore, was not properly the subject of a set-off or counter-claim, under Section 121 of Act VIII of 1859 or Section 111 of Act X of 1877, this Court holds that the Subordinate Judge and the District Judge, although they raised issues upon that counter-claim, rightly refrained from deciding the same, inasmuch as they had not jurisdiction on that suit to entertain a cross claim for such unliquidated damages. The applicants, therefore, will not be barred by Section 2 of Act VIII of 1859, or Section 13 of Act X of 1877, from bringing an independent action for those damages. Accordingly, the Court must decline to exercise its extraordinary jurisdiction on the present application, but in discharging the rule *nisi* the Court directs the parties respectively to bear their own costs thereof.

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GRANASHAM,
v.
PANDURANG.

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice F. D. Melvill.*

August 9.

NHANESING DAJI (plaintiff) Appellant v. RAUL
INDRASING JORAVARSING, deceased his wi-
dow DARYABAIJI *et al* (defendants) Res-
pondents. *

Resumption of land on service tenure.

Where a person holding lands was a dependent member of the clan of the defendant paying Salami and doing occasional service on State occasions ; *Held* that the continuance of such lands after the death of the last holder was at the discretion of the defendant and not a matter of right.

This is an second appeal from the decision of E. CORDEAUX, Esquire, Acting District Judge of Khandesh, in Appeal No. 202 of 1876.

The First Class Subordinate Judge, Mr. Ranade, in his judgment of the 12th August, 1879, says that the whole of the evidence in this case " points out that Ramsing (the person under whom the plaintiffs claim) was neither a servant nor a tenant of Indrasing (the Ravul), but was a dependent member of his clan paying salami and doing occasional service on State occasions, " and again, " All the evidence on this point of service went to prove that Ramsing, like the other Rajputs, attended Indrasing

• S. A. No. 15 of 1880 (P. 208 of P. J. 1880.)

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" on the great holidays, went on hunting excursions with him, and when he went to see the English officers accompanied him, and occasionally kept the peace at the great fairs. " For these conclusions Mr. Ranade mainly relied on the evidence given on behalf of the plaintiffs themselves. We do not find that the District Judge controverts those positions although he does not agree with Mr. Ranade in thinking that Ramsing held the land in dispute simply by way of maintenance. The father and grand-father of Ramsing were Mohansing and Chatrasing—of these Mr. Ranade says ; " The lands shown to have been standing in Mohansing's and Chatrasing's names were more extensive than those which were subsequently entered in Ramsing's name and they had to pay larger sums, which, moreover, varied from year to year, " and again : " The facts attested by the accounts of the defendant show that this is not a case of adverse or uninterrupted possession, or of regular tenancy, for the same lands were not continuously in Ramsing's and his ancestor's possession on the same terms. " The learned District Judge does not controvert the finding of Mr. Ranade that some of the Ravul's lands, held by the father and grand-father of Ramsing, were resumed by the Ravul, and not continued to Ramsing, but is of opinion that the lands in dispute have been held by Ramsing and his father and grand-father successively. That may be so, but there is not any evidence to show, or any reason to suppose, that the lands in dispute were held on any different tenure or other terms than the lands resumed from his father and grand-father ; and the legal inference hence is that the continuance of the lands in dispute to Ramsing and to his widow after his death was at the discretion of the Ravul and not a matter of right.

The circumstance of resumption of certain lands held by the father and grand-father of Ramsing was precisely, we think, such an additional fact as the High Court (West and Pinhey, JJ.) when remanding this cause on the 24th February 1879 for retrial, on the ground that it had theretofore been insufficiently investigated, would have regarded as of great importance, so we are unable to concur in the slight

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degree of woight which the District Judge appears to have attributed to it.

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For these reasons we affirm the decree of the District Judge of the 27th September, 1879, with costs.

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v.
RAUL INDRASINGH.

August 10.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

AMARSANG MALUBHAI and others (defendants)

Appellants v. BAI MAN, widow of Gopal Tulsi,

deceased, her heirs Devji Ramji and others

(plaintiffs) Respondents and *vice versa*.*

Landlord and tenant—Notice to quit—Yearly tenant—

Talukdari village—Bom. Act I of 1865, S. 49.

A yearly tenant is entitled to six months' notice to quit independently of Bombay Act I of 1865, s. 49, which does not apply to alienated villages unless specially extended to them.

These are Cross Second Appeals from the decision of A. L. LARKEN, Esquire, Acting Assistant Judge of Ahmedabad, in appeal No. 152 of 1878.

The Court must accept the Acting Assistant Judge's finding on the evidence that the plaintiff was a yearly tenant. As regards the question of notice, the Acting Assistant Judge was in error in applying Bombay Act I of 1865 to the case, inasmuch as Section 49 of the Act shows that the Act is not applicable to alienated villages, unless it has been specially extended to them: and it is not alleged that it has been so extended to the village of Jalia. Under the decision, however, in *Nanabhai vs. Pestonji* (1), the plaintiff was entitled to six months' notice, independently of the Act, unless there was, as alleged by the defendant, a general custom in Talukdari villages to the contrary. There was no issue, nor evidence taken, in the Court of first instance on this question, which was raised for the first time in the lower Appellate Court. This Court, must, therefore, require the Court below to find (after taking, or causing to be taken, such evidence as the parties may produce), upon the following issues, namely, (1) Has the plaintiff proved that she was forcibly evicted by the defendants, without having received six month's notice?

* Cross S. A. Nos. 152 and 183 of 1880 (P. 209 of P. J. 1880.)

(1) 6 Bom. H. C. R. 31.

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(2) If so, has the defendant proved that, by a general custom prevailing in Talukdari villages, the plaintiff was not entitled to six months' notice ?

(3) If the second issue be found in favour of plaintiff, then, what damages has the plaintiff sustained, in consequence of her eviction without due notice ?

August 10.

Before Sir Michael Roberts Westropp, Kt. C. J. and
Mr. Justice F. D. Melvill.

GOVINDAYA NARNAPA (plaintiff) Appellant v.
KODSUR VENKAPPA (defendant) Respondent.*

*Evidence, of partition—Unregistered partition deed—
Secondary Evidence.*

Secondary evidence of the contents of an unregistered but comparably registrable deed of partition, cannot be received, but in order to establish the partition, and its nature, the parties would be left to such evidence of separate possession, payment of assessment, &c., as might be forthcoming and properly admissible.

This is a second appeal from the decision of A. L. Spens, Esquire, District Judge of Kanara, in Appeal No. 22 of 1878.

It does not appear whether the deed of partition whereof the plaintiff sought to give secondary evidence was registered. If it were registered, there would not be any valid objection to admission in evidence of the draft of it (Exhibit 28), compared as it is deposed to have been, with the original deed of partition.

Exhibit 25, the deed of partition, given in evidence on behalf of the defendant, was not registered, and the value of the property, the subject of it, being over Rs. 100, that exhibit was not admissible in evidence; nevertheless it was (erroneously) admitted in evidence by both of the Courts below.

If the original partition-deed, relied on by the plaintiff, but not produced, were registered, we think that, under all of the circumstances of this case, (and especially the refusals of the defendant to swear that it had not been deposited with or given to him as mentioned by the Subordinate Judge), it would have been right for the learned

* S. A. No. 203 of 1880 (P, 210 of P. J. 1880.)

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District Judge to have adjourned the hearing of the appeal for a few days in order to allow the plaintiff to give to the defendant *formal* notice to produce that original, of the necessity of the production of which for the plaintiff the defendant must previously have been well aware, and not to have refused altogether to permit the plaintiff to give secondary evidence of it as he did.

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If the original deed of partition were registered, there ought to be secondary evidence of the contents of that document in the Registration office which should be produced. If that original were not registered, neither the draft of it (Exhibit 28), nor any other secondary evidence of it would be admissible, and the parties would be left to such other evidence of the nature of the partition or of facts from which that nature might be implied, *e.g.*, separate possession, payment of assessment, &ca., as may be forthcoming and properly admissible.

As to Exhibit 45 being inconsistent with Exhibit 3, we do not altogether concur in the views of the District Judge. The plot of ground in dispute is expressly included in the parcels of land specified in Exhibit 3, the deed of sale to the plaintiff, but is omitted in the parcels specified in Exhibit 45. No doubt, the assessment in Exhibit 3 and in Exhibit 45 is given at Rs. 17-12-0, but it must be observed that Exhibit 45 was executed about three weeks only before the filing of the plaint in the present suit, and that witness No. 43, the Mulgeni lessee in Exhibit 45, in his evidence stated that the plot of land now sued for was purposely omitted because the plaintiff (the lessor) informed him that there was a dispute then pending as to it, a reason for the omission which has all the appearance of truth about it, and which tends to show that the reference to the assessment as Rs. 17-12 was merely matter of description and carelessly given without qualification in Exhibit 45. Moreover, the word "babat," which, in connection with the share of kapanaya, is used in Exhibit 45, and is translated in the High Court translation as "*belonging to the share of kapaya,*" we are informed by our present interpreter, Mr. Anandray, and by our late interpreter (now an eminent pleader in this Court)



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Mr. Shamrav Vithal, may be rendered "on account of" or "belonging to" and is usually employed in implying a part rather than the whole of the matter with which it is connected, and that if the whole of the share of Kapanaya were intended to be signified, the word "babat" would in all probability have been omitted.

For the foregoing reasons, we think that this case needs further investigation, and, therefore, we reverse the decree of the District Judge, and remand the cause for a new trial by the District Judge on the merits. Such further evidence as may appear to him to be necessary and desirable may be received by him. Costs of suit and appeals to abide the final result of the suit.

August 16.

Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice F. D. Melvill.

BHAVANRAV ABAJI Applicant v. GANGARAM
NAGARDAS *et al* Opponents.*

*Construction of Statute—Retrospective effect—Act
XII of 1879, Ss. 91, 102.*

S. 91 of Act XII of 1879 was not retrospective any further than it was made so by S. 102. The latter section did not affect the right of an applicant who had preferred his appeal to the District Court before the Act came into force, to have his appeal heard and determined by that Court.

This is an Application against the order of C. F. H. Shaw, Esquire, District Judge of Belgaum, in Miscellaneous Appeal No. 28 of 1879.

The appeal to the District Court was presented to it on the 29th March, 1879. The Civil Procedure Amendment Code (Act XII of 1879) received the assent of the Governor General on the 29th July, 1879. Section 91 is not retrospective any further than it is made so by Section 102, the effect of which, in the present case, would be that if the appeal had by mistake been presented to the High Court before the 29th July, 1879, instead of to the District Court, the High Court would, if the appeal were pending in the High Court at or after the Act was passed, have been bound to hear and determine the appeal in the same way as if the Act were

* Extra. Application No. 33 of 1880 (P. 214 of P. J. 1880.)

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in force when the appeal was presented to the High Court. But Section 102 does not affect the right of the appellant to have his appeal to the District Court (which was presented there before the Act passed) heard and determined in the District Court, in the same way as if the Act had never been passed. Costs of this application to follow the final result of the appeal to the District Court.

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*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice F. D. Melvill.*

August 17.

**CHOTURAM PITASHET (plaintiff) Appellant v.
DAMA TOLARAM (defendant) Respondent.***

*Mortgage—Merger—Colorable Sale to defeat creditors—
Costs—Alternative case—Change of form of suit.*

A *bona fide* mortgage does not become merged in a deed of sale by the mortgagor to the mortgagee which is found to be a colorable sale for the purposes of defeating execution creditors. Where a mortgagee on the strength of such a deed of sale, sued to recover possession from a purchaser of the mortgaged property at an execution sale with notice of the mortgage, but set forth in his plaint his title as mortgagee, he was allowed to rely on his mortgage and recover possession though the sale deed was found to be colorable.

This is a second appeal from the decision of Rav Bahadur, Mahadev Govind Ranade, First Class Subordinate Judge of Khandesh at Dhulia, with Appellate powers, in Appeal No. 180 of 1878.

We concur in the decree of Mr. Ranade, the First Class Subordinate Judge, in so far as it holds the deed of sale by Parashram to the plaintiff Choturam to be colourable and of no effect. It was merely intended to be a blind to execution-creditors, and no consideration was given to Parashram for it. Those facts seem to have been substantially admitted by Parashram and the plaintiff in their depositions. One, however, of the consequences of the deed of sale being null and void, is that the original mortgage of the 8th July, 1870, for Rs. 256, could not have been merged in the deed of sale. And we are of opinion that the instalment bonds were intended to be supplemental to, and not in supersession of, the mortgage of 1870. If that mortgage were valid

* S. A. No. 200 of 1880 (P. 215 of P. J. 1880)



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at the time of its creation, and if it have not yet been paid off, we consider it still to be in force, and to bind the lands mentioned in it to the extent of principal and interest still remaining due in respect of the principal money, Rs. 256, the consideration for that mortgage. The validity of that mortgage has not been seriously disputed, but the First Class Subordinate Judge has not come to any finding on that question, or as to what sum is now due upon the mortgage. Nor has he found whether any instalment payable under the instalment bonds was allowed to fall into arrear. If every instalment were punctually paid on or before the day it fell due, the plaintiff could not enforce the mortgage against the land, but if an instalment has been permitted to fall into arrear on either bond, the whole sum secured by such bond has fallen due under the stipulations contained in those bonds. In the latter case, so far as the whole sum which has fallen due on the instalment bonds, forms part of the principal and interest payable under the mortgage, the mortgage will be enforceable, and the plaintiff will be entitled to recover possession of the mortgaged lands and to hold the same until the money so due on the mortgage is repaid. The plaint does not seek foreclosure and sale, so, all that in this suit can be given to the plaintiff, the mortgagee, would be possession. Any moneys (including the money due on the bond for Rs. 66) covered by the instalment bonds, other than those moneys secured by the mortgage of 1870, cannot be enforced under that mortgage. Although the plaintiff sought, by his plaint, possession under the deed of sale, yet he has set forth in his plaint his title as mortgagee, and he caused notice of his mortgage to be given to the defendant at the time of judicial sale to the latter—so the defendant purchased with full notice of the mortgage of 1870. There cannot, therefore, be any injustice in permitting the plaintiff to enforce his mortgage (if valid) by possession under this suit, and neither he nor the mortgagor Parashram seems to have, by false swearing, attempted to establish the deed of sale as a genuine transaction.

For these reasons, we reverse the decree of the First Class Subordinate Judge, save so far as it declares the deed of sale to be colourable and of no effect, and we remand this cause

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for retrial by him on the question whether the mortgage of 1870 is a valid transaction, and, if so, to ascertain what sum is due thereon to the plaintiff for principal and interest, and, in the event of the defendant, or the mortgagor Parashram, not paying to the plaintiff within one calendar month after the First Class Subordinate Judge notifies to the defendant and the said Parashram the amount which the said Subordinate Judge finds to be due for principal and interest on the said mortgage of 1870 to the plaintiff, let the plaintiff be put into possession of the said mortgaged premises as mortgagee to hold the same until the said mortgage be duly redeemed or paid off.

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In the event of the First Class Subordinate Judge finding that the said mortgage of 1870 is valid in its creation, or that there is nothing due thereon for principal or interest, he should dismiss this suit with costs thereof and of both appeals to be paid by the plaintiff to the defendant.

In the event of the said Subordinate Judge finding that the mortgage of 1870 is valid, and there is money due thereon to the plaintiff for principal or interest, he should direct the plaintiff to bear his own costs throughout, for this reason that the plaintiff put forward a sham deed of sale. The defendant, too, should in the last mentioned event bear his costs throughout.

*Before Mr. Justice M. Melvill and Mr. Justice
Kemball.*

September 13.

KRISHNARAV HANMANT, deceased, by his grand-
son **ANANTRAV NARSINH** (plaintiff) Appellant
v. **ANTAJI VIRUPAKSH**, deceased, by his son
RAGHUNATHRAV and others (defend-
ants) Respondents.*

*Execution of decree—Adjustment out of Court not certified
—Act VIII of 1859, S. 206—Subsequent conduct of
parties, evidence of.*

The provisions of Section 206 of Act VIII of 1859 prevent a Court from taking cognizance of any adjustment or payment said to have been made out of court, unless the same were duly certified to the Court, but where the conduct of a decree-holder rendered it perfectly clear that there must have been some adjustment out of Court then in justice to

• Appeal No. 11 of 1879 (P. 221 of P. J. 1880.)

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the parties it would be necessary to admit evidence of the nature of the adjustment in spite of the provisions of Sections 90 and 91 of the Evidence Act.

This is an appeal against the order of C. F. H. SHAW, Esquire, District Judge of Belgaum, in Darkhast No 5 of 1875.

The High Court in its decree of the 8th March 1865, ordered that the plaintiff should recover Rupees 14,983-4-6 against the defendants, with six years' simple interest on that sum at Rs. 9 per cent, up to the filing of the plaint; and it further ordered that the plaintiff should be paid interest upon the sum decreed at the rate of Rs. 9 per cent. per annum until payment; and it added "the defendant Bhavanrav so desiring it, let reference be had, in levying the amount of this decree, to the fact that Bhavanrav is a grandson of Antaji, the original debtor." The costs of the suit were laid upon the defendants.

The effect of this decree we take to be this. The sum decreed was Rs. 14,983-4-6 principal and Rs. 8,090-15-6 interest, total Rs. 23,074-4-0, which sum was to bear interest at the rate of Rs. 9 per cent. per annum until payment. The sum of Rs. 1,322-4-2 was also payable by the defendants as costs. The whole amount was recoverable, jointly and severally, from all or any of the defendants, but with this limitation, viz., that the defendant Bhavanrav, being a grandson of the original debtor, was not liable in his person nor in his property, other than the ancestral property, for more than the principal sum of Rs. 14,983-4-6. The ancestral property in his hands would be liable for the full amount of the debt, including interest: Uderam vs. Ranu Panduji (1).

Such being the liability of the defendants under the decree, the question is to what extent that liability has been reduced by subsequent transactions. It is contended on behalf of the defendants, Dada Saheb and Bhavanrav, that a compromise was made with each of them, by which they were to be discharged on payment of the sum of Rs. 8,000 by each. The District judge has found that Antaji's agent and Vakil, by whom this compromise is said to have been made, had no authority to enter into any such adjustment of the decree. We are inclined to think that the District Judge is right; but it is unnecessary for us to decide the question, because we are

(1) 11 B. H. C. R. 76.



of opinion that the provisions of Section 206 of Act VIII of 1859 prevent us from taking cognizance in this case of any adjustment or payments said to have been made out of Court, unless the same were duly certified to the court. It is true that in *Chanjo vs. Kalaram* (1), the Court held that, in a case in which the judgment-creditor had discharged his debtor from gaol, he could not plead the provisions of Section 206 as operating in his favour. The principle on which this case was decided we take to have been this; that the conduct of the plaintiff showed clearly that there must have been some adjustment or settlement of his decree, and that, therefore, in justice to the parties it was necessary to admit evidence of the nature of the adjustment. It is the same principle on which Courts of Equity have allowed the conduct of parties to be referred to as proving that a transaction which was on the face of it a sale was in reality a mortgage. But in such cases the Courts have always required that the conduct of the parties should be such as to lead most clearly and unmistakeably to the conclusion that it arose from the circumstance of there having been an agreement by way of defeasance. If there were any room for doubt on this point, the Court would not allow an agreement to be proved, in face of the provisions of Sections 91 and 92 of the Evidence Act. Nor on the same principle would any Court allow the provisions of Section 206 of Act VIII of 1859 to be infringed, unless the conduct of the decree-holder rendered it perfectly clear that there must have been some adjustment out of Court. In the present case, this is not by any means clear. It is true that the decree-holder raised an attachment, from the property of Dada Saheb and Bhavanrav, but he stated that he did so, because there was a prospect of coming to terms with them; and he afterwards re-imposed the attachment, without any immediate objection on their part. It is impossible to draw from this any certain conclusion that an adjustment of any kind must have taken place. For this reason we hold that parol evidence of such an adjustment or any evidence of payment, made out of Court is inadmissible, unless such payments were actually or virtually certified to the Court, in accordance with the requirements of Section 206. We think that the sums amounting to Rs. 7,700, paid by Bhavanrav,

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(1) 4 B. H. C. R. 120.



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were virtually certified to the Court, when Antaji's pleader admitted in Court that these sums had been paid. But the sums amounting to Rs. 4,505, said to have been paid by Dada Sahab, have nothing of the kind to support them, and they cannot, therefore, be proved, nor taken into account, in this proceeding.

The account of the amount due under the decree at the date of the darkhast must be taken in the following manner. The sum of Rs. 23,074-4-0, and costs Rs. 1,322-4-2, must be debited to the defendants, and interest must be calculated on Rs. 23,074-4-0, from date of decree to date of payment. On the other side of the account, the defendants must be credited with payments made by them, amounting to Rs. 25,113-2-8, admitted by the plaintiff, and Rs. 7,700 paid by Bhavanrao. Each payment must be appropriated in the first instance to the payment of costs and next to the reduction of interest due at the date of payment; any amount, by which any payment may exceed the interest so due, being applied in reduction of the principal.

In taking the account, the sum of Rs. 898-7-0, being the difference between the sum of Rs. 25,113-2-8, admitted by the plaintiff, and the sum of Rs. 24,214-11-8, which the execution proceedings show to have been recovered, is by consent of parties to be taken as a payment made on the day preceding the presentation of the plaintiffs' last darkhast.

The amount which, on taking the account on the above principle, may be ascertained to be due, will be recoverable from the property of the defendants other than Bhavanrav, and from those defendants personally, and also from the ancestral property in the hands of Bhavanrao. The sum of Rs. 7,283-4-6 being the difference between the principal sum of Rs. 14,983-4-6, for which Bhavanrav is personally liable, and the sum of Rs. 7,700 paid by him, will also (if not otherwise recoverable) be recoverable from Bhavanrav's property, other than ancestral property, and from Bhavanrav personally.

Each party to bear his own costs throughout.



*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice F. D. Melvill.*

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August 23.

**BABAJI LIMBAJI (plaintiff) Appellent v. SATU
JOGU et al (defendants) Respondents.***

Hindu Law — Alienation by widow before adoption.

A mortgage executed by a widow would bind the adopted son if it were executed by her *bona fide* to secure a debt (neither illegal, nor immoral) of her husband and before the adoption, or to secure a debt incurred for such purposes as a widow may legitimately charge the estate of her husband.

This is a second Appeal from the decision of R. F. Maotier, Esquire, District Judge of Satara, in Appeal No. 116 of 1879.

The District Judge has found on evidence sufficient for the purpose, that Lalitabai has adopted Shivaji, and that finding must be accepted as conclusive upon this Court.

It appears, however, that the Subordinate Judge, being of opinion that there had not been any such adoption, omitted to inquire into the nature of the debt for which the sale had been made on the 26th October, 1872, to the plaintiff Babaji and to record in evidence a deed alleged to have been executed on the 2nd Maha Vad Shakh 1787 (1st February 1866) by Lalitabai to Lingoji Rav, her judgment creditor, at whose suit the sale took place—see Darkhast Exhibit No. 45 in this suit. That deed was sent for by the Subordinate Judge, and several witnesses named in the darkhast were summoned to give evidence. But the Subordinate Judge, for the reason above mentioned, did not examine them. If the deed of the 1st February, 1866, were executed by Lalitabai *bona fide* to secure a debt (neither illegal, nor immoral) of her husband, and before the adoption, or to secure a debt incurred for such purposes as a widow may legitimately charge the estate of her husband, it would bind the adopted son. These questions do not appear to have been brought to the attention of the District Judge. This Court accordingly requests him to try the following issues :—

1. Whether Lalitabai executed to Lingoji Rav a deed in respect of a debt (incurred neither for illegal nor immoral purposes) due to him by her husband, and, if so, what was

* S. A. No. 70 of 1880 (P. 226 of P. J. 1880.)



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the date of such deed, and was the same executed before or after her adoption of Shivaji.

2. Whether a deed was executed by Lalitabai to Lingoji Rao for a debt incurred by herself, in respect of necessary family purposes for which a Hindu widow may lawfully charge the estate of her husband, and, if so, what was the date of such deed, and was the same executed before or after her adoption of Shivaji.

The District Judge should cause the Subordinate Judge of Dahiwari to examine the witnesses mentioned in dar-khast Exhibit No. 45, and to send for the said alleged deed, and to forward to the District Judge the depositions of the witnesses and the said deed or a duly certified copy of the same, which depositions and deed or copy thereof should together with the District Judge's findings on the issues and his reasons for the same be forwarded to this Court with all reasonable despatch.

Further directions and costs reserved.

September 13.

Before Mr. Sargent and Mr. Justice M. Melvill.

PUNJABHAI GHELABHAI (plaintiff) Appellant v.
THE COLLECTOR OF KAIRA (defendant) Respondent.*

*Bom. Act III of 1878, s. 12—Fiscal Act—Construction—
License tax illegally levied, suit to recover.*

S. 12 of Bombay Act III of 1878 does not authorize a Collector to enhance the fee on a person presenting a petition as contemplated by S. 11. Though the words of S. 12 that the Collector may pass "such order thereon as he thinks fit" are large, yet the act being a fiscal Act, must be construed strictly, and the words "order thereon" must be taken as meaning an order relevant to the petition, which an order enhancing the fee cannot be deemed to be.

Where a Collector has levied an enhanced fee under such circumstances a suit will lie against him to recover the excess.

This is an appeal from the decision of S. H. Phillpotts, Esquire, District Judge of Ahmedabad, dated the 31st January, 1880, in the above case.

We think that Section 12, Bombay Act III of 1878, did not authorise the Collector to enhance the fee on the plaintiff presenting his petition as contemplated by Section 11.

Special Appeal No. 28 of 1880 (P. 242 of P. J. 1880.)



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Section 12 says that the Collector may pass "such order thereon as he thinks fit." These words are doubtless large, but the Act under consideration being a fiscal Act, and therefore to be construed strictly, we think that the words "order thereon" must be taken as meaning an order relevant to the petition, which an order enhancing the fee cannot, we think, be deemed to be. As the Collector has, in our opinion, exceeded his authority, under the Act, the case does not fall within the principle laid down in the case of Chinto Abaji *vs*, Lakshmibai (1) which we should otherwise have considered to be applicable, and the plaintiff has, therefore, a cause of action against the Collector, to recover the difference between 60 Rupees and the sum of 25, mentioned in the list published under Section 10 of Act. This Court, therefore, reverses the order of the Court below, and directs that the plaint be admitted. Collector to pay plaintiff his costs of this appeal.

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THE COLLECTOR
OF KAIRA.

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice F. D. Melvill.*

September 1.

AMBU TATHU (plaintiff) Appellant *v.* NIMJI MA-
HASING (plaintiff) Respondent. *

*Execution of a decree—Attachment of contingent or ex-
pectant claim—Mortgage—Notice—Razinama—
Limited interest of mortgagor.*

A claim on a third person contingent or expectant upon a judgment-debtor's making payment cannot be attached or sold in execution of a decree against him.

A mortgagee with notice that the mortgagor, to whom a third person has executed a *razinama* resigning the mortgaged land absolute on its face, but accompanied by an agreement that it should only operate as a security for any debts of the former holder as the mortgagor should pay, has, under such agreement, only a limited interest; or who has notice of such circumstances as ought to have put him on inquiry, *e. g.*, that the person executing the *razinama* has continued in possession, will only acquire the mortgagor's limited interest.

This is a second appeal from the decision of E. Cordeaux, Esquire, Acting Judge of Khandesh. in Appeal No. 100 of 1879.

* S. A. No. 240 of 1880 (P. 244 of P. J. 1880.)
(1) 2 Bom. 376.

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The defendant Nimji, when owner and in possession of the land in dispute, is alleged to have executed a razinama resigning that land in favour of Ana, who subsequently is alleged to have executed a mortgage of it for Rs. 400 on the 27th of July 1873 to the plaintiff. Upon that mortgage the plaintiff is stated in the plaint to have obtained a decree in 1876. Under that decree an attachment was on behalf of the plaintiff laid upon the land on the 24th February 1877. On the 5th of June 1877 Nimji applied to the Subordinate Judge's Court to raise the attachment on the ground that the razinama in favour of Ana had been merely executed to Ana as a security for any debts of Nimji which Ana might pay for Nimji, and that Ana's ownership had never begun (which may or may not mean that Ana had not paid any debts for Nimji), and that he Nimji had always been in possession, and had paid the assessment, and Ana had never been in possession. The Subordinate Judge granted that application on the 18th August 1877. In 1878 the present suit was brought by Ambu (the plaintiff) to have the land declared to be the property of Ana and available for the payment of the amount found due on his mortgage under the decree of 1876 to plaintiff. Neither the razinama, nor the mortgage by Ana, nor the plaintiff's decree of 1876, nor any copies of those documents are in evidence. It is rather remarkable that neither of the Courts below required the production of those documents. Their absence has occasioned difficulty to this Court in disposing of a case so meagre in evidence. Acting probably on admissions, the District Judge (who reversed the decree of the Subordinate Judge in favour of the Plaintiff) has found that the razinama by Nimji was executed to Ana merely as a security for any debts of Nimji which Ana might in his capacity of surety for Nimji pay in his behalf. But the District Judge has not found whether Ana did as such surety pay any debts for Nimji. Until it is ascertained whether or not Ana did pay such debts before the attachment it is impossible to say whether at that time Ana had any beneficial interest in the land. If upto that time he had not paid any such debts for Nimji, Ana would not then have had any such right in the land as could be attached or sold under the decree of 1876. In that case he would only have had a claim contingent or expectant

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upon his making such a payment, and that claim could not be attached or sold under Act VIII of 1859. Syud Tuffazul *vs.* Raghunath Persad (1).

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It has, however, been contended on behalf of Ambu that the razinama, executed by Nimji in favour of Ana, being in absolute terms, Ambu was justified, when taking a mortgage from Ana, in supposing that Ana was absolute owner, and in dealing with him as such, and is therefore entitled to stand upon the decree on his mortgage whether or not there was such an arrangement as above mentioned between Nimji and Ana. But if Ambu had notice of the limited nature of Ana's right, or of such circumstances as ought to have put him on inquiry, it would not be possible for Ambu to sustain that proposition. It is said that Nimji continued in possession of the land notwithstanding the razinama, and the District Judge appears to lean towards that view, for he says that "Nimji is now in possession, and there is no reason for holding that Ana was ever in possession." If that be so, it would be difficult to hold that Ambu, when taking his mortgage from Ana, did so without knowledge of such circumstances as ought to have put him, if he were acting *bona fide*, on inquiry as to the nature and extent of Ana's title (if any) to the land.

We think that there must be a new trial (at which the documents, the absence of which we have above noticed ought to be produced) and that the District Judge should, on such new trial, determine whether Ambu, when he took his mortgage of 1873 from Ana, had notice of limited nature of his title to the land, or of such circumstances as ought to have put him (Ambu) on inquiry of Nimji or other persons as to such title; and, if the District Judge shall be of opinion that Ambu had not notice of the limited nature of Ana's title, or of any circumstances which ought to have put him on inquiry as to the same, the District Judge should make a decree for the plaintiff Ambu; but if the District Judge should be of opinion that Ambu had, when taking the said mortgage, notice of the limited nature of Ana's title or of such circumstances as ought to have put Ambu on such in-

(1) 14 Moore's Ind. App. 40.



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quiry as aforesaid, then the District Judge should proceed to inquire whether previously to the attachment of the 24th February 1877 any, and what, debts had been paid by Ana as surety for Nimji and were not repaid by Nimji to Ana. If the District Judge shall determine that question in the affirmative, he should declare that, to the extent of such debts, Ana had an interest in the land, and such limited interest may be attached and sold under the decree of 1876, but if he determine that question in the negative he should make a decree for the defendant Nimji. Costs throughout should follow the final result of the new trial.

September 6. *Before Sir Michael Roberts Westropp Kt., C. J. and Mr. Justice F. D. Melvill.*

SHA SHIVLAL PURSHOTAM (defendant No. 1) Appellant v. SHA RAMDAS GULABCHAND (plaintiff) Respondent. *

Mortgage—Covenant to repair—Damages.

A mortgagor is liable in damages for the breach of a general covenant to repair the mortgaged premises contained in the mortgage deed for the protection of the mortgagee's security.

This is a second Appeal from the decision of S. H. PHILLPOTTS, Esquire, District Judge of Ahmedabad, in Cross Appeals Nos. 237 and 241 of 1878.

There having been, in the mortgage, for the protection of the mortgagee's security, what is equivalent to a general covenant to repair by the mortgagor; the house having been destroyed by fire, and the mortgagor not having repaired, the Courts below rightly awarded the damages given by their decrees which are accordingly affirmed with costs.

September 7.

Before Sir Michael Roberts Westropp, Kt. C. J. and Mr. Justice F. D. Melvill.

NAGARBHA1 HIMATRAM plaintiff v. GOVIND-RAM KEVALRAM and others defendants. †

Stamp Act XVIII of 1869 S. 15. cl. 10—Lease to cultivator.

Under clause 10 of Section 15 of Act XVIII of 1869 a lease granted

* S. A. No. 208 of 1880 (P. 246 of P. J. 1880.)

† C. R. No. 13 of 1880 (P. 267 of P. J. 1880.)

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in 1877 to a " cultivator " without payment by him of any fine or premium in consideration is exempted from stamp duty.

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This is a reference from the Subordinate Judge of Olpad, under Section 49 of Act I of 1879.

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The Court is of opinion that the lease, having been granted in 1877 to " a cultivator " without the payment by him of any fine or premium in consideration, is altogether exempted from stamp duty by Clause 10 of Section 15 of Act XVIII of 1869.

The Court, therefore, answers the question of the Subordinate Judge in the negative.

Before Sir Michael Roberts Westropp Kt., C. J. and Mr.
Justice Kemball.

September 14.

GULAM MOHIDIN MAHAMAD IBRAHIM Appellant
v. BALA KADAR BANJI *et al* Respondents. *

Sale in execution of decree, setting aside—Civil Procedure Code, Act X of 1877, S. 313.

Previously to setting aside a sale under S. 313 of act X of 1877, the Court is bound to enquire whether the person whose alleged property has been sold had no saleable interest therein and the judgment-debtor and judgment-creditor must be given an opportunity of being heard on such enquiry.

The mere production by the applicant of a certified copy of a registered deed of sale from the judgment-debtor is not sufficient ground for setting aside the sale. The *bona fides* and due execution of the deed before the attachment was laid on must be proved.

This is an appeal against the order of Rav Saheb Ramchandra Ballal Bhagvat, Second Class Subordinate Judge of Mahad, in Application No. 93 of 1879.

Previously to setting aside a sale under Section 313 of Act X of 1877, the court is bound to inquire into the question whether or not the person, whose property purported to be sold (*i. e.*, whose alleged property has been sold), had no saleable interest therein, and the judgment-debtor and the decree-holder must be given an opportunity of being heard upon such inquiry. The mere production by Bala valad Kadar of a certified copy of the registered deed in favour of Fatma Bibi from the Registry Office was no sufficient ground to

* Appeal No. 20 of 1880 (P. 254 of P. J. 1880.)



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set aside the sale. For it was necessary that the deed of sale itself should have been produced, unless some sufficient reason could be established for its non-production, and that, at all events, its execution should be proved, and that it was so executed *bona fide* with the intention that the property the subject of it, should pass from Sherifa Bibi to Fatma Bibi and that the deed of sale was not a merely colourable transaction, and that the change of ownership was not merely ostensible but real ;— that is to say, that the intention of the parties was not that Fatma Bibi should be merely a trustee for Sherifa Bibi to shield the property from execution. and that Sherifa Bibi should continue to be the real owner. As to what is a colourable sale, the case of Rajan Harji *vs.* Ardeshir Hormusji Wadia (1) and the authorities there quoted may be referred to. Further the Court should ascertain whether the deed of sale was executed before the attachment, in the suit of Gulam Mohidin against Sherifa, was laid on the property. For if it were not executed previously to the laying on of that attachment, the deed of sale, whether it was colourable or not, would be void as against the purchaser Bala, and the existence of such a deed would not render the property unsaleable—see Section 276 of Act X of 1877 and Section 240 of Act VIII of 1859. None of the above inquiries having been made by the Subordinate Judge we reverse his order of the 22nd January, 1880, and remand this matter for a fresh inquiry to be made in conformity with what has been said above. Costs of this appeal must follow the ultimate decision on such new inquiry.

October 7.

Before Mr. Justice Sargent and Mr. Justice Kemball.
DEVSHANKAR VITHALJI, deceased, his widow,
LAKSHMI, and others (defendants) LALA-
BHAI HARIBHAI *et al* (plaintiffs) Res-
pondents. *

Arbitration—Arbitrators, suit against.

Arbitrators are not liable to be sued for want of skill and negligence in making their award but if they act fraudulently and corruptly or maliciously they are answerable in damages to the parties grieved.

* S. A. No. 253 of 1880 (P. 267 of P. J. 1880.)

(1) 4 Bom. p. 70.

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This is a second appeal from the decision of A. H. Unwin Esquire, Acting Assistant Judge of Ahmedabad, in Appeal No. 140 of 1878.

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It is well established that arbitrators are not liable to be sined for want of skill or negligence in making their award—but that if they act fraudulently and corruptly or maliciously they are answerable in damages to the parties grieved—see Addition on Torts p. 596, and the authorities there cited; also Russell on Awards, p. 478. In the present case the Assistant Judge has found that “there is nothing in the evidence to support an imputation of fraud or corruption against the arbitrators, but that they have not scrutinized the accounts with the care and attention reasonably to be expected of skilled professional accountants.” Upon this finding the defendants cannot be held liable in damages to the plaintiffs, and the decree of both the lower Courts must therefore be reversed and judgment passed for the appellants with costs throughout.

*Befroe Sir Michael Roberts Westropp Kt. C. J. and
Mr. Justice F. D. Melvill.*

October 5.

KARANI AHMEDULA Saheb bin AHMAD Saheb
Applicant v. GANPAYA BAB SHANBHOG
Opponent. *

*Principal and surety—Discharge of surety—Stay of
execution pending appeal.*

A person who becomes surety for a judgment-debtor in consideration of a stay of execution pending an appeal by the latter, is relieved from liability on the judgment-creditor obtaining a discharge of the order for stay of execution.

This is an application from the order of Rav Bahadur Ramrav Subaji, First Class Subordinate Judge of Kanara, at Karwar, in Application No. 72 of 1879, dated the 23rd January, 1880.

The consideration for which the applicant Karani Ahmedula Saheb entered into his contract of suretyship was that execution against his principals, the defendants Devaru Shanbhog and Shridhar Shanbhog, should be stayed, pending the Regular Appeal 31 of 1875, but before that appeal was heard

* Extra. Application No. 58 of 1880 (P. 270 of P. J. 1880.)



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or disposed of, the order for stay of execution was discharged at the desire of the plaintiff, hence the surety also was discharged, as he did not obtain that for which he contracted, namely, a stay of execution pending the regular appeal. We, therefore, make absolute the rule nisi and reverse with costs the order of the Subordinate Judge of the 23rd January, 1880, and direct that, if the money therein mentioned has been paid by the surety, it be returned to him.

September 22.

Before Mr. Justice Sargent and Mr. Justice M. Melvill.

PREMCHAND RAICHAND (plaintiff) Appellant v. .
GOSWAMI JADUNATHJI BRIJRATANJI
MAHARAJ. deceased, his son and heir, GO-
SWAMI GHANESAHMJI (defendant)
Respondent *

Registration—Agreement not to execute decree—Interest in immoveable property.

The right to execute a decree is not a right or interest in or to the immoveable estate of the judgment-debtor, but simply a right to apply for the process of the Court, hence an agreement which limits or extinguishes the right to execute a decree does not require registration.

This is an appeal from the decision of Rav Bahadur Mangesh Balwant, First Class Subordinate Judge of Surat, in Original Suit No. 155 of 1876.

We think that the Subordinate Judge was wrong in holding that the suit was barred. By the agreement entered into in 1865 between the plaintiff and the father of the present respondent, the defendant was not to execute his decree which he had obtained in Suit No. 360 of 1863 against the Bhansali's property in Surat, but was to be at liberty to serve the judgment-debtors with a notice to keep the decree alive. In 1869 the defendant presented an application for the attachment of a portion of that property, the subject of the present suit, which application was resisted by the representatives of the firm of Bhansali, the judgment-debtors; the litigation which ensued continued up to 1870, when, on the 25th September, an attachment was issued to the defendant. It was contended for the respondent that the application for attachment in 1869 was a breach of the agree-

* Appeal No. 24 of 1880 (P. 271 of P. J. 1880.)

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ment, and that plaintiff's cause of action accrued on that day, and was barred when the plaintiff instituted his present suit on 22nd March, 1876. The undertaking not to execute the decree against the Surat property of the firm of Bhansali standing by itself might fairly be construed as an undertaking not to sue out any process in execution against such property—but here it must be read in connection with the liberty reserved to the defendant to give the judgment-debtors a notice so as to keep his decree alive. Upon the application for attachment being made, the Court, under Section 216 of Act VIII of 1859, would serve the judgment-debtors with notice of the application, and as there is no other proceeding which would keep the decree alive, it must be presumed that it must be the one which the parties had in their contemplation, and the plaintiff was, we think, entitled to regard it as such until the attachment actually issued on 25th September, 1870. But in any case the process of executing the decree which was forbidden to the defendant by the agreement. is in its nature a continuous act until the property of the judgment-debtor is realized, and there would be, therefore, on general principles of law a distinct cause of action at every moment of such period. This principle is enunciated in express terms in the Statutes of Limitation of 1871 and 1877—but it was equally applicable when Act XIV of 1859 was the Statute of Limitation in force. Secondly, we think that the Subordinate Judge was wrong in holding that the agreement of 1865 required to be registered. That agreement only limits or perhaps extinguishes the right to execute the defendant's decree—but the right to execute a decree is not a right or interest in or to the immoveable estate of the judgment-debtor, but simply a right to apply for the process of the Court. Lastly, the Subordinate Judge was in error in holding that the right to sue on the agreement of 1865 vested in the plaintiff's trustees under his insolvency by virtue of Act XXVIII of 1865. The agreement, however, was entered into on behalf of the creditors of Bhansali as appears on the face of the agreement and, therefore, the right to sue on it did not pass to the plaintiff's trustees. As to the plaintiff having assigned his right to Bhansali, which merely rests on a statement of plaintiff's

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vakil, which we think, must have been understood by the Judge, there was no issue raised on the effect of it, and the fact was distinctly denied before us. The decree of the Court below must, therefore, be reversed, and the case remanded to be tried on the merits. Costs to be costs in the cause.

October 6.

*Before Mr. Justice M. Melvill and Mr. Justice
Kemball.*

**GULAM HUSAIN SHEIK ALI and others (de-
fendants) Appellants v. DAMODAR JAGAN-
NATH (plaintiff) Responent. ***

Sale in execution of decrees, Proof of.

A Karkun's memorandum of sale and of payment of purchase money is not sufficient proof of sale without proof of confirmation of the sale and of the certificate.

✓ Second Appeal from the decision of C. B. Izon, Esquire. District Judge of Ratnagiri, in Appeal No. 483 of 1878.

In 1828, twenty-two members of the More family mortgaged a 1/12th share of a village to Phanse.

In 1867 Phanse sub-mortgaged his interest as mortgagee to Pilambhat Thatte for Rs. 330 with possession.

In 1872 (July 25th) two of the Mores obtained against Phanse a decree for redemption of the 1/12th share on payment of Rs. 1,251-3-2 within a specified time. They failed to pay that sum and thereby under the same decree the interest of those two Mores in the equity of redemption became foreclosed.

In 1873 (August 18th) Vamnaji, son of Pilambhat Thatte, (then deceased), assigned his interest as sub-mortgagee to the defendants, and the defendants entered into possession.

In 1873 (20th December) the right, title and interest of Phanse in the mortgaged premises (i. e., his equity to redeem the sub-mortgage of 1867, and his absolute interest in the interest of the two foreclosed mortgagors) is by the defendants alleged to have been sold at a judicial auction sale to the defendant Abaji, and for this, Exhibit 37, the Karkun's memorandum of the sale of and of payment of the purchase

* S. A. No. 258 of 1880 (P. 278 of P. J. 1880)

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money, is produced in support of this allegation. There is, 1880
however, no evidence of confirmation of the sale and no certi-**GULAM HUSAIN**
ficate of the sale. Hence we cannot hold that by this alleg-
ed sale the interest of Phanse in the equity of redemp-
tion and two foreclosed mortgagor's sub-shares passed to
defendant Abaji. **DAMODAR.**

In 1874 (June 5th) the right, title and interest of Pha-
nse in the sub-mortgaged premises was, at a judicial sale at
the suit of Ganesh Dixit against Phanse, sold to the plaintiff
Damodhar Jagannath Thatte as appears by certificate of
sale dated the 27th July, 1874.

This last sale of the interest of Phanse, we think, was eff-
ectual to pass that interest subject to the sub-mortgage of
1867, vested in the defendants to the plaintiff, as, for the
reasons already given, we think that no previous effectual
sale in 1873 of the interest of Phanse to the defendant Aba-
ji has been proved.

Under these circumstances we think that the decree of the
District Judge, allowing the plaintiff, to redeem the mort-
gage of 1867 now vested in the defendants, was right.

We affirm the decree of the District Judge, except as to
costs. Ordinarily a mortgagor or his assignee or representa-
tive should pay the costs of suit to redeem, unless the
mortgagee misconduct himself. Here we cannot say that the
mortgagee's defence was unreasonable. He has failed simply
on the technical error into which he has fallen of not having
procured a certificate of the sale to him in December, 1873.
The parties throughout must bear their own costs.

*Before Sir Michael Roberts Westropp, Kt. C. J. and
Mr. Justice Kemball.*

September 21.

**RACHAPA VYANKAPA Applicant v. RAVJI
ANANT Opponent.***

*Sale in execution of decree—Mortgage decree, stay of, to
enable judgment-debtor to mortgage or sell—Act
X of 1877, S. 305.*

A judgment-debtor against whom a decree on a mortgage had been
made, obtained without opposition on the part of the judgment-credi-
tor an order under S. 305 of Act X of 1877 (Civil Procedure Code)

• Extra. Application No. 35 of 1880 (P. 283 of P. J. 1880.)



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staying the sale of the mortgaged property in order to enable him to sell or mortgage the same to satisfy the mortgage-decree, and succeeded in selling the property under registered deeds of sale, the purchaser paying into Court sufficient of the purchase money to satisfy the mortgage decree. The deeds of sale were then lodged in Court for the confirmation of the sale.

At this time another suit by the judgment-creditor for money, not founded on any mortgage of the property, nor seeking to enforce any lien thereon was pending and the Court delayed disposing of the application for the confirmation of the sale until the mortgagee had obtained a money decree therein, and then on the mortgagee's application refused to confirm the sale and ordered the purchase-money to be returned.

Held that the Court was wrong in so acting, and an order was made directing the lower Court to confirm the sale.

Umadkhansama v. Maharanee Raj Roop Koer 1 W. R. 295 dissented from.

This is an application against the order of Rav Saheb Amrat Shripat, Second Class Subordinate Judge of Barsi, in Darkhast No. 451 of 1879.

Upon the 5th of June, 1879, the respondent, Ravji Anant, obtained against the applicant, Rachapa Vyankapa, a decree upon a mortgage of immoveable property for the amount due thereon ; and a sale by auction of that property was subsequently ordered to be made towards satisfaction of that decree. However, on the application of Rachapa Vyankapa, unopposed by Ravji Anant, a certificate was given by the Subordinate Judge to the former on the 12th of September, 1879, reciting that the sale by auction directed by the Court, was stopped " in order that the mortgaged premises or some portion thereof may be privately mortgaged or sold, and the amount of the decree, namely, Rs. 1,117-8-6, may be realised, and that therefore this certificate is given by the Court, and the Court authorizes the said judgment-debtor (Rachapa Vyankapa) to mortgage or sell the property as he may choose within eight days, but on the condition that the money which may be realized by the mortgage or sale should be paid into Court, and not to the judgment-debtor." That certificate or permission was given under Section 305 of Act X of 1877, as amended by Act 12 of 1879. Rachapa Vyankapa, under the certificate, sold the property in two lots to Sunder Malhar, and executed to him two deeds of sale, dated res-

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pectively the 19th September, 1879, (registered the 22nd September, 1879), and the 20th September, 1879, (registered the 23rd September, 1879 ;) and Sundar Malhar, upon the 24th September, 1879, paid into Court the sum Rs. 1,121-8-6 in satisfaction of the decree of Ravji Anant, being the full amount due thereon together with some additional costs. The deeds of sale immediately afterwards on being obtained from the Register office were lodged in Court for the confirmation of the sale by the Subordinate Judge. Subsequently, however on the 8th October, 1879, Ravji Anant, having represented that he had just obtained another decree (a money decree) against Rachapa Vyankapa and that a larger sum than Rs. 1.121-8-6 could be obtained for the mortgaged premises, induced the Subordinate Judge to refuse to confirm the sale to Sunder Malhar, and on the 9th October, 1879, the Subordinate Judge made indorsements on the deeds of sale to the effect that he refused to confirm them, and on the 10th October he made an order refusing to accept the purchase money, and ordered it to be returned to Sundar Malhar, the purchaser. Thereupon, Rachapa Vyankapa appealed to the Assistant Judge, but the latter, although apparently of opinion that the Subordinate Judge's order was wrong, held that no appeal lay to him (the Assistant Judge), and advised that Rachapa Vyankapa should make a fresh application by way of review to the Subordinate Judge to receive the money and confirm the deeds of sale to Sundar Malhar, which application Rachapa Vyankapa did make to the Subordinate Judge, but he refused it on the 26th November, 1879.

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It is admitted that on the 24th September, 1879, when Sunder Malhar paid the purchase money into Court, there was neither any decree (except that of the 5th June 1879), nor attachment (except that founded on the decree of the 5th June, 1879), against the mortgaged premises which had been sold to Sunder Malhar. The suit, in which subsequently Ravji Anant, obtained the money decree mentioned in the Subordinate Judge's Court on the 8th October, 1879, may have been then pending, but that suit was not such a *lis pendens* as could in any wise affect the mortgaged premises. It did not seek to enforce any lien on the mort-



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gaged premises, nor could the decree, subsequently pronounced in it, confer any such lien or affect those premises until an attachment to enforce that decree was issued, and laid upon those premises. Ravji Anant is a pleader of the Subordinate Judge's Court, and we regret that the Subordinate Judge should have permitted himself to frustrate the sale to Sundar Malhar, in order to endeavour to procure a surplus beyond the amount of the decree of the 5th June, 1879, in the mortgage suit, to meet a possible future decree in favour of Ravji Anant in another suit not in respect of any lien on the mortgaged premises, and in which surplus, if it existed on the 24th September, 1879, Ravji Anant had not any such interest as a Court either of Law or Equity could recognize. Nor did he seek even an attachment before judgment, in the money suit then pending against the mortgaged premises, on the ground that Rachapa Vyankapa's conduct brought him within Sections 483 and 484 of Act X of 1877. The Subordinate Judge delayed, as we think improperly, the disposal of Rachapa's application for confirmation of the private sale to Sundar Malhar until Ravji Anant had time to obtain a decree in his money suit, which decree itself gave him no lien on the mortgaged premises, and it is not alleged that any attachment had even been issued upon that decree on the 9th or 10th of October, 1879, the days on which the Subordinate Judge made the indorsements on the deeds of sale, and refused to accept Sundar Malhar's purchase money.

It has been contended here, on the authority of Umdakhanum vs. Maharanee Raj Roop Koer (1) that Section 305 of Act X of 1877 was inapplicable to such a case as the present, there having been a sale decreed in satisfaction of a mortgage. But in the first place the private sale ordered on the 12th September, 1879, was so on due notice to Ravji Anant, and that order was not opposed by him. In the next place, the case cited, though decided upon Section 243 of Act VIII of 1859, analogous to section 305 of Act X of 1877 was one in which a manager, and not permission to raise the money by mortgage or private sale, was applied for. The Court, it is true, is represented as saying general-

(1) 1 W. R. 295.



ly that " Section 243 of Act VIII of 1859, does not apply
" to a decree founded on a mortgage when that decree de-
" clares that certain property is to be sold in satisfaction of
" the mortgaged debt. The creditor's right of sale in
" such case rests on the mortgage decree and not on attach-
" ment in execution. The decree cannot be varied by pro-
" ceedings in execution thereof." We do not concur in that
reasoning. A decree on a mortgage, if properly framed,
allows a reasonable time to the mortgagor to redeem by
payment of the amount found due to the mortgagee and
awarded by the decree. If the money be paid within that
time, the mortgagee's right to a sale ceases, and it matters
not to him whence the money is obtained, provided he is
paid the full amount of his decree. We do not regard the
permission to the mortgagor to raise the necessary amount
by private sale or mortgage as any variation of the decree, the
substance of which is that the mortgagee shall be paid in
full the amount of his mortgage claim. And if that amount
be raised by mortgage or private sale, the mortgagee does
virtually recover that amount from the mortgaged premises.

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For these reasons, the orders of the Subordinate Judge of
the 10th October, 1879, and 26th November, 1879, are set
aside, and the Subordinate Judge is to receive from the pur-
chaser Sundar Malhar the sum of Rs. 1,121-8-6 in satisfac-
tion of the decree of the 5th of June, 1879, and the Subor-
dinate Judge is directed to cancel his indorsements of the
9th October, 1879, upon the deeds of sale, and to make
fresh indorsments thereon confirming the deeds of sale, and
to state in such fresh indorsements that they are made and
the former indorsements are cancelled by order of this
Court. The respondent Ravji Anant is to pay to the ap-
plicant Rachapa Vyankapa his costs of this application.

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Kemball.*

September 29.

MEHTA SAMUL RANCHORE and others Plaintiffs.
v. PIRZADA PIR MIAN MIANSAHEB, deceased, his
sons, AHMED MIAN and BAKAR MIAN, minors, by
their guardian, the Collector of Ahmedabad Defendants,

Civ. Ref. No. 10 of 1880 (p. 285 of P. J. 1880.)

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MENTA SAMUL
v.
PRASADA PRQ
MIAN.
Sale in execution of decree by Collector—Act. X of 1877, S. 320—Government Notification 7733 of 22nd December 1879—Construction Retrospective effect—Nemo debet esse judex in propria causa.

The Government Notification (No. 7733) of the 22nd December 1879 is retrospective and is applicable to sale of immoveable property ordered on Darkhasts presented before the date of notification. It is concerned with procedure only, and takes away no right. It follows the language of Section 320 of Act X of 1877 which was intended to apply as well to sale, already directed, but not carried into effect as to sales to be thereafter directed.

A Collector though an administrator of the estate of the infant Defendants under Act XX of 1864 may lawfully be appointed to conduct the sale of the property of the infants even though Section 321 (taken in connection with Section 305) and Sections 322 to 327 inclusive impose upon the Collector judicial duties. No doubt it is a maxim of law that no man shall be a judge in his own cause yet it is competent for the legislature to over-rule it in particular cases.

This is a Reference from Rav Bahadur Mukanrai Manirai, First Class Subordinate Judge of Ahmedabad, under Section 617 of Act X of 1877.

The first point made by the learned pleader for the judgment-creditors (the plaintiffs) is that the notification (No. 7733) of the 22nd December, 1879, in the Bombay Government Gazette of the 25th December, 1879, is not retrospective, *i. e.*, that it is inapplicable to sales of immoveable estate ordered on the darkhasts presented before the date of the notification. We think that we must decide that point in the negative. This notification is concerned with procedure only, and takes away no right. Hence there is not any presumption against a retrospective construction of it, if the language used be capable of such an interpretation. The notification relates expressly to "cases in which a Civil Court has ordered the sale of any " immoveable property belonging to &c.," which language, if construed with strict severity, is retrospective only and not prospective. We have, however, little doubt that Government intended to include sales thereafter to be directed as well as sales theretofore directed. If we be right in that conjecture, it will be advisable, in order to avoid disputes, that Government should amend its notification by adding after the words "has ordered " the words " or may hereafter order. " The draftsman of the notification has followed the language of Section 320 of Act X of 1877, which is itself defective in clearness of expres-



sion, but, in our opinion, was intended to apply as well to sales already directed, but not carried into effect, as to sales to be thereafter directed. The second point, made for the judgment-creditors, was that the Collector, being under Act XX of 1864 administrator of the estate of two infant defendants, Ahmed Mian and Bakar Mian, the sons of Pirzada Pir Mian deceased could not lawfully be appointed to conduct the sale, inasmuch as Section 321 of Act X of 1877 (taken in connection with section 305), and Sections 322 to 327 inclusive, impose upon the Collector judicial duties, and that it is a fixed principle of law that no man shall be at once both judge and party in his own case. No doubt, that is a maxim of law, but it is competent for the Legislature to overrule it in particular cases, though the less frequently this happens the better for the public. We must assume that, when the Indian Legislature was enacting Act X of 1877, it was aware of the existence of Act XX of 1864 and consequently aware also of the possibility of the Collector being in many cases the administrator thereunder of the estates (of infant defendants) liable to judicial sales, but nevertheless was not pleased to except such cases from the scope of Section 320 of Act X 1877. Although it is true that the Collector is only officially and not beneficially interested in those cases, yet it is desirable that government should so far respect the ancient and valuable maxim of law "*Nemo debet esse iudex in propria causa*" as to make a rule (as can be done under the latter portion of Section 320) that in those cases the sale, &c., shall be conducted by one of the Assistant Collectors (1). The third point urged for the judgment-creditors was that the Government Notification is not applicable to the defendant Mamdu Mian, and this we must hold to be so, inasmuch as neither Bombay Act VI of 1862 nor Act XIV of 1877 is "applicable" to him. Albeit that he may be a Talukdar of Ahmedabad, and that Bombay Act

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(1) In the case of Nusserwanji Pestonji *vs.* The Deputy Commissioner of Customs, Salt and opium, Government, through its Law officers, assented to a new trial of an appeal where the first trial had been of a judge who had previously been the defendant in his official capacity of Deputy Commissioner of Customs &c., 9 Harrington's S. D. A. Rep. 609, and see the same case in 2 Bom. H. C. Rep. 75. 82. *et seq.*

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VI of 1862 once may have been applicable to him, nay more has been applied to him and his estate, yet he and his estate having been discharged under that Act by Mr. Peile, the Talukdari Settlement Officer, by notice of the 12th January, 1866, which appears in the Bombay Government Gazette of the 1st of February, 1866, p. 201, it is a necessary inference from Section 20 of that Act, when read with the preamble of the same Act, that neither he nor his estate can be again subjected to the Act. We may observe that the Government Notification of the 22nd December, 1879, mentions, by mistake, Bombay Act VI of 1866, which is "an Act to amend the law relating to certain declarations of office;" we, however, have read the notification, in accordance with the obvious intention, as referring to Bombay Act VI of 1862, the Ahmedabad Talukdari Act. We have not overlooked a possible argument that the words "to whom the provisions of Bombay Act VI of 1862, or of Act XIV of 1877 are applicable" should be limited to the immediately antecedent words "or other person" and not to the preceding words "a Talukdar, Thakur," but the introduction of the reference to Bombay Act VI of 1862 excludes any such argument, inasmuch as that Act relates solely to Talukdars of Ahmedabad; whereas Act XIV of 1877 relates to Thakurs, Talukdars, Jagirdars, Kasbatis and such other classes of holders of estates in Broach and Kaira as the local Government may, with the previous sanction of the Governor General in Council, declare to be Thakurs for the purposes of that Act (Section 3).

The fourth point made for the plaintiffs is that there is nothing in the case submitted for the opinion of this Court, to show that Bombay Act VI of 1862 is applicable to the infant defendants, the sons of Pirzada Pir Mian. For, it is said that, although they may be Talukdars of Ahmedabad, and so far within the scope of the Act, and although the Act may not have been heretofore applied to them or their estate, yet there is not any assertion or proof that they are subject, either personally or in respect of their landed estates of any description of tenure, to debts or liabilities equal to or exceeding five times the average rents, profits and other annual income derived by them from their estates aforesaid

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during the last five years, after deducting thereout the land tax and other dues of Government within the meaning of Section 1 of Bombay Act VI of 1862. This point can, we think, be of importance only if the estates of those infant defendants be separate from those of the defendant Mamdu Mian. If that defendant and the infant defendants be intitled, either as joint tenants or as tenants in common, to the immovable estates ordered by the Civil Court to be sold, we are of opinion that, inasmuch as the Government Notification of the 22nd December, 1879, certainly is not applicable to Mamdu Mian, it cannot be applied to his joint tenants or tenants in common, the infant defendants. It would moreover, in such a state of facts, be practically impossible and ruinous to all parties to have their interests sold separately. But if they be not joint tenants or tenants in Common with Mamdu Mian of all of the lands ordered by the Civil Court to be sold, and if they be entitled to some of them separately from Mamdu Mian, it will be necessary for the Subordinate Judge to inquire and ascertain whether the infant defendants personally or their said estates, which they hold separately from Mamdu, are subject to debts equal to or exceeding five times the average rents, profits and other annual income of their landed estates of any description of tenure during the last five years after deducting thereout the land tax and other dues of Government. If the Subordinate Judge, after taking such evidence may be necessary to enable him to ascertain whether the infant defendants or their estate is or are indebted to that extent, comes to the conclusion in the affirmative, he should make over to the Collector the separate estate (if any) of the infant defendants for sale by him, or for such other course as Section 320 to 327 of the Civil Procedure Code of 1877, as amended by Act XII of 1879, may justify. On the other hand, if the infant defendants be joint tenants or tenants in common with the defendant Mamdu Mian of all of the lands ordered by the Civil Court to be sold, or if they personally and their estates be not involved in debt to the extent required by Section 1 of Bombay Act VI of 1862, the sale should be made by the Civil Court and not by the Collector.

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October 6.

BOMBAY HIGH COURT

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice Kemball.*

**DINSHAJI JIVANJI and others (defendants) Ap-
pellants v. SHERIADJI HIRJIBHAI (plaintiff)
Respondent. ***

*Contract—Coercion—Contract Act IX of 1872, Ss. 15,
165.*

Where a partner by detaining a large sum of money which was being sent by his co-partners to a creditor of the firm, caused them to execute a bond in his favour.

Held, that the bond had been obtained by coercion and was therefore voidable under S. 15 of the Contract Act. S. 165 of that Act is mainly for the protection of the bailee and will not protect a partner who, for his private purposes, detains, or threatens to detain, partnership money or goods to the detriment of the partnership at large.

This is an appeal from the decision of Rav Bahadur Mangeshrav Balwant, First Class Subordinate Judge of Surat in Original Suit No. 449 of 1877.

This is an appeal against a decree of the First Class Subordinate Judge of Surat made on the 6th of March, 1880.

The action was brought on a bond of the 12th May, 1876, for Rs. 8000 payable by annual instalments of Rs. 1,000 each together with interest on the principal. The plaintiff is a nephew of the first defendant, Dinsha, (being the son of Hirjibhai, brother of Dinsha), and a partner of Dinsha and of the second defendant, Palanji to the extent of a two annas share in a cotton ginning factory at Ilav in the taluka Hansot, Broach District. The obligors of the bond are the defendants Dinsha and Palanji as principals, and the defendant Jivanji as surety. Jivanji is father of Hirjibhai and Dinsha, and grandfather of the plaintiff Sheriadji. The bond was given in satisfaction of the plaintiff's claims as partner. It was contended in the written statements of the first and second defendants that the plaintiff had not any right to sue on the bond, inasmuch as his father Hirjibhai, and not the plaintiff, was the real partner; and the bond was given to the plaintiff for Hirjibhai. But this was a point of no value. The plaintiff, whether personally interested, or only nominally so, as trustee for his father, being

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the obligee named in the bond, was the right person to sue upon it, and this was properly admitted by Mr. Telang, one of the learned counsel for the defendants, at the hearing of this appeal before us. Another question in the Court below was whether, default having been made in payment of the first instalment, the whole amount covered by the bond had become due. The learned Subordinate Judge held that only the first instalment (Rs. 1,000) and interest thereon (Rs. 720) were recoverable in the present suit, and made a decree for the plaintiff for Rs. 1,720 with costs in proportion to that amount. It was not seriously contended before us on behalf of the plaintiff that the whole amount of the bond had become due in consequence of default in payment of the first instalment. The real question before this Court was whether the bond had been obtained under such coercion as to invalidate it.

Hirjibhai had been since 1868 and was in 1876, at the time of the execution of the bond, an inspector of Police at Surat, and most probably was the person who supplied to the factory the portion of its capital (alleged to be Rs. 4,500 or Rs. 5,000) introduced into it by or in the name of his son the plaintiff, who, in 1867, when he became a partner, was not more than 18 or 19 years of age. Hirjibhai took the measures which resulted in the execution of the bond, and probably is the person really interested in it, but it is not necessary for us to decide that point. For several years before the date of the bond the books of the partnership at Ilav appear to have been unsatisfactorily kept and not balanced. On January the 3rd, 1874, the defendants Dinsha and Palanji appear to have executed a san mortgage of the factory to Dinsha Dadabhai and Co., of Bombay for Rs. 13,500. Hirjibhai seems to have applied to those defendants for moneys in respect of the share standing in his son's name, and a promise was given to him in December, 1875, that the money should be forthcoming in May following, but neither money nor account of the application of the capital, nor any account of the profits or earnings of the factory seems to have been then rendered either to him or his son. Even though the plaintiff or his father may have seen or had opportunities of seeing the books of the factory, it is evident from the de-

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scription, if true, given of them by the defendant Palanji, that those books could have afforded to them but little satisfactory information. Hirjibhai, not unnaturally being dissatisfied with the manner in which he and his son, the plaintiff, had been treated, laid an embargo upon a sum of Rs. 10,000 which was in course of transmission from the factory at Ilav to Bombay under the following circumstances. The defendants Dinsha and Palanji had with the firm of Dinsha Dadabhai and Co., of Bombay considerable business transactions, either on account of the factory or of those defendants themselves. Whether the particular transaction in respect of which the sum of Rs. 10,000 was being sent from Ilav to Bombay was on account of the factory or on account of those defendants themselves, is not of importance at present, inasmuch as our decision on this appeal must be the same in either case. In taking the account between the plaintiff and those defendants which we are about to decree, it may be a question of considerable importance whether that transaction was one on account of the factory or of the defendants Dinsha and Palanji and their sub-partners only. Those defendants allege that a balance of Rs. 10,000 was due to Dinsha Dadabhai and Co. in respect of money sent to Ilav for the purchase of cotton, the whole of which cotton could not be or had not been procured. It is not denied that either from the factory or from the defendants Dinsha and Palanji and their sub-partner or sub-partners a sum of Rs. 10,000 was due in May, 1876, to Dinsha Dadabhai and Co. of Bombay, and that those defendants regarded it as a pressing debt. The defendant Dinsha, early in that month, gave to Chandulal (a mehta of the factory) Rs. 10,000 to take from Ilav to Bombay, and to deliver to Dinsha Dadabhai and Co., at Bombay in payment of the Balance abovementioned. The money was contained in five bags, each holding Rs. 2,000. Those bags were sealed and addressed to Dinsha Dadabhai and Co. Chandulal on his way to Bombay stayed at Surat, and there gave the five bags to Hirjibhai for safe custody, as Chandulal said he had done on former occasions with other monies of which he had been the bearer on account of the factory. Chandulal asked for the bags on the following morning, but Hirjibhai refused to give them to him, because (Chandulal says) the plaintiff (Hirjibhai's son) "wanted money

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for the expenses of ground, which he had taken on lease in Asadla village. " Chandulal adds that he told Hirjibhai that the Rs. 10,000 had been debited to Dinsha Dadabhai in the account books of the factory and belonged Dinsha Dadabhai and Co., and therefore must be sent to them, but Hirjibhai refused to give it. At Chandulal's request, Hirjibhai did give him a letter addressed to Dinsha, and admitting the detention of the money, which letter Chandulal retained for his own security. Chandulal immediately advised the defendant Dinsha of the retention of the money by Hirjibhai, and on the next day, the defendants Dinsha Palanji and Jivanji Bhikaji (Patil) and Jivanji Palanji repaired from Ilav to Surat. They had an interview with Hirjibhai. Dinsha told him that the money belonged to Dinsha Dadabhai and Co., and should be sent to them, but Hirjibhai refused to give it up, unless the defendants executed a bond in settlement of his son's share in the factory. To this the defendant Dinsha declined to consent, and went away to the Hotel. Subsequently the defendant Jivanji and Jivanji Limji (who was a friend of the defendants) carried on a negotiation between defendants Dinsha and Palanji and Hirjibhai, the result of which was the execution of the bond by the defendants now sued on, and of a deed of release (farkhat) by the plaintiff to them foregoing all his share and interest in the factory from the time the Rs. 8,000 should be paid in full. On the execution of those instruments the Rs. 10,000 were made over to the defendants and carried to Bombay.

Dinsha, in about four days after the execution of those documents, sent from Bombay to the plaintiff to Hirjibhai a notice that he (Dinsha) did not hold himself bound by the bond, as it was obtained by duress. A correspondence ensued, which it is not necessary to discuss at any length, but in one letter the plaintiff seem to regard himself as still entitled to an account, which right was scarcely consistent with the bond and release to the 12th May, 1875. The defendants Dinsha and Palanji have not taken any steps to set aside the bond. The plaintiff, in 1877, brought his present suit, and the defendants are entitled to set up in it that which is their principal defence, namely, that the bond was obtained by coercion and not with their free consent, and

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therefore, is voidable under Section 14 and Section 19 of the Indian Contract Act, IX of 1872. Section 15 of that Act defines "coercion" as "the committing or threatening to commit any act forbidden by the Indian Penal Code, or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement." It is within the letter portion of that Section that the defendant's counsel have argued that this case falls. If the Rs. 10,000 were the private moneys of the 1st and 2nd defendants or of Dinsha Dadabhai and Co., and were transmitted by those defendants in payment of a balance due to Dinsha Dadabhai and Co., in respect of private transactions not those of the partnership, but of the defendants, then it is quite clear that Hirjibhai was a mere bailee of those moneys and bound to return them to Chandulal on the morning on which he demanded them, and Hirjibhai's detention of them was unlawful, and was coercion practised by him on those defendants in order to compel them to enter into an agreement in settlement of his partnership dispute with them. If, on the other hand, the money was that of the partnership (*i. e.*, the factory), and was being transmitted by the defendant Dinsha as managing partner, which he certainly was, to Bombay, in payment of a debt due by the partnership to Dinsha Dadadhai and Co., we think that the detention was unlawful and as it certainly was intended to cause, and, as we are of opinion, did cause the defendants to enter into the bond, we must hold it to have been procured by coercion, and therefore, to be voidable. Section 165 of the Indian Contract Act which provides that "if several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of one joint owner without the consent of all in the absence of any agreement to the contrary." But that Section seems to us to be mainly for the protection of the bailee. And we do not think that it would protect a partner, who, for his private purposes, detains or threatens to detain partnership money or goods to the detriment of the partnership at large. It would not be so if the detention were for the benefit of the partnership at large and not merely for the private benefit of the partner



making the detention. The detention of a considerable balance due by the partnership to a Bombay house with which it had large transactions, was calculated to injure the credit of the partnership with that particular house and also with the public. Hirjibhai evidently knew that the delay in the payment would be regarded as a serious mischief to the partnership by the defendant, and that such pressure would force them to come to terms with him. There is no maxim of equity more strictly enforced than that ancient rule of the Civil Law "*In societatis contractibus fides erubet*" (1) which fairly paraphrased, means that the utmost good faith must govern partners in their dealings with each other in respect of partnership matters. Mr. Collyer (2), Mr. Justice Story (3) and Mr. Justice Lindley (4) give numerous examples of the application of that rule. Though none of those cases are precisely similar to the present, the principle, viz., that one partner shall not benefit himself to the injury of his co-partners is the same. V. C. Wigram in *Blissett vs. Daniel* (5) said : "The view taken by this Court with regard to morality of conduct amongst all parties—most especially amongst those who are bound by the ties of partnership—is one of the highest degree."

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Upon the evidence before us we are quite unable to say whether or not the amount of the bond (Rs. 8,000) fairly represents the plaintiff's share of the assests of the partnership over and above the liabilities. The account books have not been put in evidence. They have not, as already stated been balanced for many years, and we fear that little confidence can properly be placed in them. Upon the oral evidence the amount due to the plaintiff is left quite uncertain. The defendant Dinsha denied that anything was due to the plaintiff at the time of the execution of the bond, whereas

(1) Codex IV. tit. XXXVII. 1. 3, *vide etiam* Cic. pro Sexto Roscio Ameriano pl. XL. " In rebus minoribus socium fallere turpissimum est, " iterumque " Recte igitur majores cum, qui socium fefellisset, in virorum bonorum numero non putarunt habere oportere. "

(2) Collyer, Bk. 2, Chap. 2, Sec. 1.

(3) Story on Partnership, Chap. IX. Sections 172 to 179.

(4) Lindley on Partnership, Bk. III. Chap. 2, Sections 1 and 2.

(5) 10 Hare 433; 536.



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the defendant Palanji admits that there was something due to the plaintiff at that time.

Under these circumstances, and having regard to the unlawful detention of the Rs. 10,000 by Hirjibhai on behalf of the nominal partner his son, whereby the defendants were coerced into the execution of the bond, we think that the safer course will be to reverse the decree of the subordinate Judge and to direct that an account of the partnership dealings and transactions from the commencement of the partnership must be taken, and that the bond should be ordered to stand as a security as against the 1st and 2nd defendants for such amount (if any) as may be found due, on the taking of the said account, to the plaintiff. If the defendants Dinsha and Palanji or either of them has or have without the authority of the plaintiff and Hirjibhai been engaged in dealings in the purchase or sale of cotton or in other transactions not properly within the scope of the cotton ginning factory's business, such dealings and transactions cannot form any part of the account to be taken and the plaintiff cannot have the profit or bear the loss arising upon such transaction. But, if the defendants have been employing the capital of the cotton ginning factory, or any part of such capital, in such dealings and transactions as last aforesaid, they must account for the same and be charged with interest on the same or with the profit realised on such transactions at the option of the plaintiff. All the books, papers, accounts and vouchers of the cotton ginning factory and all books, papers, accounts and vouchers as relate to any such illegitimate employment as aforesaid by the defendants or either of them of the capital of the factory must be produced by the defendants and lodged in the Court of the Subordinate Judge.

We agree with the learned Subordinate Judge, in holding that Kaikhusru was not a partner of the plaintiff, and that the plaintiff is not bound in this suit to recognise him as such. He may be a sub-partner of the defendants Dinsha and Palanji or of one of them, but that does not concern the plaintiff.

We also concur in the opinion of the Subordinate Judge that the defendant Dinshahas falsely denied the execution of the release by the plaintiff on the same day as that on which

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the bond was executed; and we think that the defendant Palanji has grossly prevaricated as to that release, and that not only in its execution by the plaintiff to the defendants Dinsha and Palanji on the 12th May, 1876, proved satisfactory and that too partly by some of those defendant's own friends and witnesses, but also that Palanji purchased the stamped paper on which it was written, and we are of opinion that those defendants are now dishonestly keeping back that release, and that the Subordinate Judge was right in admitting a copy thereof as secondary evidence of it. These facts and their mode of keeping the partnership books and the circumstance that, without the concurrence of the plaintiff, they have twice mortgaged the factory to Dinsha Dadabhai and Co., have determined us to refuse to give them any costs of this appeal as against the plaintiff.

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The burden of accounting must be placed upon the defendants Dinsha and Palanji.

The Subordinate Judge should take such further evidence oral and documentary as may be necessary for the proper taking of the account. He should also dispose of the costs of the suit in such manner as upon the evidence already taken and the evidence to be taken as may appear to him to be just, and he should have special regard to the question whether the defendants have been dealing with the partnership assets in a legitimate manner and within the proper limits of the business of a cotton ginning factory, and if exceeding those limits whether such excess was with the concurrence of the plaintiff or of his father Hirjibhai who has substantially been representing the plaintiff.

Our decree is as follows:—We reverse the decree of the Subordinate Judge, and remand the cause to the Court below to take an account of the dealings, transactions, property and assets of the partnership in the cotton ginning factory at Ilav wherein the plaintiff and the defendants Dinsha and Palanji were the co-partners-in chief, and in which the plaintiff is entitled to a share of two annas in the rupee, and let the Subordinate Judge take such Account from the time at which the said partnership commenced down to the 12th day of May, 1876, from which



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day this Court declares the said partnership to have been dissolved. Let the Subordinate Judge ascertain what sum (if any) was due on the said account on the said 12th day of May, 1876, to the plaintiff in respect of his said share from the said partnership. This Court decrees that the defendants Dinsha and Palanji do pay the said sum to the plaintiff. And it is directed that the bond of the 12th day of May, 1876, in the plaint mentioned, shall, (as against the defendants Dinsha and Palanji only,) stand as security for the amount which may be found due on the taking of the said account to the plaintiff: but this direction that the said bond should stand as such security is not to exonerate the defendants Dinsha and Palanji from payment of the amount (if any) by which the sum found due to the plaintiff on the account may exceed the amount of the said bond. If the balance found due on taking the said account, be against the plaintiff, he must pay the same to the defendants last mentioned. The defendants Dinsha and Palanji must produce before and lodge with the Subordinate Judge all the books, papers, accounts, and vouchers of the said factory and mentioned above in his judgment. The Subordinate Judge (if so advised) shall be at liberty to authorise a proper Commissioner or Commissioners to take the said account and to report to him. The parties respectively must bear their own costs of this appeal. The Subordinate Judge when making his decree, after the taking of the account hereinbefore directed, shall dispose of the costs of the suit, account and retrial before him in such manner as may, having regard to the conduct of the parties respectively, be just. The defendant Jiwanji, being no longer a necessary party to the suit, is dismissed therefrom.

November 15.

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice F. D. Mettrill.*

**CHANDRARAV PARVATRAV (defendant) Ap-
pellant v. VITHALRAV PARVATRAV
(plaintiff) Respondent.***

Vatan, suit for partition of—Bombay Act III of 1874.

* S. A. No. 283 of 1880 (P. 292 of P. J. 1880.)

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There is nothing in Bombay Act III of 1874 rendering the Sanction ¹⁸⁸⁰
of the Collector necessary to the bringing of a suit for partition of CHANDRARAY
a vatan ^{v.}

This is a second appeal from the decision of W. Wedderburn, Esquire, District Judge of Ahmednagar, in appeal No. 107 of 1878. VITHALRAY.

We see nothing in the Hereditary Officers' Act (III of 1874, Bombay,) to render the sanction of the Collector necessary to the bringing of a suit for partition of vatan. That act, however, preserves the power of the Collector to provide for the remuneration of the officiator (Sections 8, 10). The 6th Section relates to suits by the Collector and not by the Vatandars. We affirm the decree with costs.

Before Sir Michael Roberts Westropp, Kt., C. J. and November 15.
Mr. Justice F. D. Melvill.

ANANT BAPU deceased, his son and heir SITARAM,
minor by his guardian mother RAMABAI (plaintiff)
Appellant v. ARJUN GONDJI, deceased,
his son and heir BABAJI *et al* (defendants)
Respondents. *

Mortgage—possession—Notice—Prior unregistered mortgage without possession—Attornment by mortgagor.

A mortgagee with possession and without notice of a prior optionally registrable and unregistered mortgage without possession has a good title as against the latter and a purchaser at a sale in execution of a decree obtained by him on his mortgage in a suit to which the mortgagee was not a party.

Where the mortgagors attorn to the mortgagee as tenants and take the land from him for a term of years on lease, their possession is his possession.

This is a second appeal from the decision of C. B. Izon, Esquire, District Judge of Ratnagiri, in Appeal No. 122 of 1879.

The District Judge has found as a fact that the mortgage by Tulaji to Latam of the 12th May, 1863, was without possession. The mortgage by Bhadu Bhanji and Tulaji to the deceased plaintiff, Anant, of the 23rd December, 1864, was with possession, inasmuch as the mortgagors gave to the

* S. A. No. 282 of 1880 (P. 293 of P. J. 1880.)



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mortgagee, Anant, a *kabulayat* (or rent note) contemporaneous with the mortgage to Anant, whereby they attorned to him as his tenants and took the lands for a term of five years in that capacity. No case has been made for the defendants to the effect that the rent note was merely a colourable and not a real transaction, or that no rent was paid under it. The registration of the plaintiff's mortgage-deed cannot confer on the plaintiff any advantage in point of priority over Latam's mortgage or over Latam or the defendant. Babaji, the purchaser claiming under Latam, inasmuch as Latam's mortgage was not compulsorily registrable. It is not alleged that the plaintiff had notice, when the mortgage, and the mortgagors were then in possession, and by the *Kabulayat* transferred their possession as owners to the plaintiff Anant, and became his tenants. Their possession as his tenants was the plaintiff's possession. The District Judge treats that possession as technical, and for that reason refuses to give effect to it, and says that it cannot prevail as against the purchaser from Latam, who himself purchased under a decree in his mortgage suit against Tulaji and was under that decree put into possession. The possession, however, thus given to Latam was forcible and wrongful, and cannot protect either Latam or the purchaser from him. There having been complete possession given by Bhadu Bhanji and Tulaji to the plaintiff Anant, and such possession being *bona fide* and not colourable, it conferred according to the Hindu Law prevalent throughout this Presidency, except in Guzerat so far as we know, priority on the plaintiff's mortgage over that of Latam which was without possession, and Latam did not make the plaintiff a party to the suit brought by Latam on his mortgage, so the plaintiff is not in anywise bound by the decree in that suit or the sale made or possession given under it. We must, therefore, vary the decree of the Courts below by directing that the plaintiff do recover from the third defendants all of the lands in the plaint mentioned, and do recover from the third defendant, Babaji Arjun Naik, the costs of the suit and of both appeals. In other respects the decree of the District Judge is to stand affirmed.



*Before Mr. Justice M. Melvill and Mr. Justice Nanabhai
Haridas.*

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November 16.

**RAMCHANDRA DAJI Applicant v. VISAJI
BAPUJI Respondent.***

Khote, liability of, to pay khoti faida.

One of the sharers in a *khoti* village frequently cultivates land in the village on his own account, and in respect of such land he may or may not be liable to pay *khoti faida* to the whole body of sharers including himself. If he were to buy a piece of *dhara* land from a *dharekari*, he would not be liable to such payment any more than the *dharekari* himself. If, on the other hand, he were to take up a piece of waste *khoti nisbat* land, he would be liable in the absence of a special agreement to the contrary with the other sharers.

This is an Application against the decree of J. L. Johnston, Esquire, Acting Assistant Judge of Ratnagiri, in Appeal No. 224 of 1878.

We do not think that the question at issue in this case has been satisfactorily dealt with by either of the lower Courts. It appears that Krishna Dixit was a sharer in the *khoti* village of Lote, and also cultivated a *thikan* or field in the same village. The plaintiff has purchased the right, title and interest of Krishna Dixit in the field, and the defendant has purchased the right, title and interest of Krishna Dixit in the *khoti vatan*. The defendant having passed the *kabulayat* for the whole village during the year to which the dispute has reference, the Collector has assisted him to recover *khoti faida* from the plaintiff on account of the field purchased by the plaintiff, and the plaintiff has brought this suit to recover the amount so levied from him. The question is whether the plaintiff is liable to pay to the defendant, as representing the whole body of *khotes*, any *khoti faida* in respect of the field in his occupation. This question can only be determined by ascertaining the terms on which Krishna Dixit held the field. One of the sharers in a *khoti* village frequently cultivates land in the village on his own account, and in respect of such land he may or may not be liable to pay *khoti faida* to the whole body of the sharers, including himself. If he were to buy a piece of '*dhara*' land from a *dharekari*, he would not be liable to

* Extra. Application No. 49 of 1880 (P. 297 of P. J. 1880.)



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such payment, any more than the *dharekari* himself. If, on the other hand, he were to take up a piece of a waste *khoti nisbat* land, he would be liable in the absence of a special agreement to the contrary with the other sharers. The plaintiff has succeeded to Krishna Dixit's rights in the field in dispute, and no more; and the lower Courts ought to have required the parties to show on what tenure Krishna Dixit held the field. The case must be remanded for this purposes. It will be for the plaintiff to prove that Krishna Dixit was not liable to the payment of *khoti faida*. It will not, for this purpose, be sufficient for him to show that Krishna Dixit was a sharer in the *khoti vatan*, and that in point of fact he did not pay *khoti faida*, because it generally and naturally happens that *khoti* sharers who cultivate land in their own village, do not make any actual payments of *khoti faida*, but the amount due by each sharer on this account is adjusted when a division is made between the sharers of the entire profits derived from the villages. What the plaintiff will have to prove is that either by virtue of the original tenure of the field in dispute, or by virtue of some special agreement between Krishna Dixit and the other co-sharers, the field in dispute was held by Krishna Dixit free from the payment of *khoti faida*.

The decree of the Acting Assistant Judge is reversed and the case remanded for a new decision, after taking such evidence as may be necessary, with reference to the foregoing remarks.

Costs to follow final decision.

November 22.

Before Mr. Justice M. Melvill and Mr. Justice Nanabhai Haridas.

GANESH BALAL, deceased, his son and heir, BALAJI (defendant) v. RAGHUNATH GOPAL, deceased, his son and heir VINAYAK, minor by his guardian SARASWATIBAI *et al*
(plaintiffs) Respondents. *

Mortgage—Redemption by some of several co-mortgagors.

Any one or several tenants in common who have jointly mortgaged property is entitled to redeem the whole, and to receive the rents and

* S. A. No. 76 of 1880 (P. 300 of P. J. 1880.)

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profits until the amount due by the other co-mortgagor as their contribution towards the redemption money has been paid off. Then and not till then can the mortgagee enforce any subsequent mortgage of their shares executed by the other co-parceners.

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BAGHAT.

This is a second appeal from the decision of J. L. Johnston, Esquire, Acting Assistant Judge of Ratnagiri, in Appeal No. 137 of 1878.

We think that the Acting Assistant Judge was right in holding that the plaintiffs are entitled to redeem the whole village on payment of Rs. 2,840-4-0, the amount due under the mortgage-deeds, Exhibits Nos. 13 and 11. The plaintiffs represent two out of four tenants-in-common, by whom the property was jointly mortgaged ; and they are, therefore, entitled to redeem the whole of the mortgaged property, and to receive the whole of the rents and profits, until the amount due by Krishna, the only surviving co-mortgagor, as his contribution towards the redemption money, shall have been paid off. Then and not till then, any claim which the mortgagee may have against Krishna under the separate mortgage (Exhibit 12) executed by Krishna, will be capable of enforcement.

The Acting Assistant Judge was in error in supposing that the lease (Exhibit 86) was executed subsequently to the date of the tender and notice by Sarasvatibai. The date of the notice was the 24th September, 1873, and that of the lease was the 17th January, 1873. The lease cannot, therefore, have been made at an under-valuation for the reason supposed by the Acting Assistant Judge. We must consequently reduce the amount allowed by the Acting Assistant Judge as mesne profits to Rs. 250 per annum from the year 1873-74 to the year 1878-79.

We see no reason to alter the Acting Assistant Judge's order that the parties should bear their own costs. The tender made by Sarasvatibai was not for the full amount due on the two mortgages, Exhibits Nos. 13 and 11 ; but on the other hand it is certain that the defendant would not have received payment of that amount, if it had been tendered, but would also have insisted on payment of the amount due by Krishna under Exhibit No. 12.

We accordingly amend the decree of the Acting Assistant

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RAGHUNATH. Judge by allowing to the plaintiffs, as mesne profits from the year 1873-74 to the year 1878-79, the sum of Rs. 250 per annum in lieu of the sum of Rs. 300 per annum, the amount allowed by the Acting Assistant Judge. In other respects the decree of the Acting Assistant Judge is confirmed.

The parties to bear their own costs in second appeal.

November 23. *Before Sir Michael Roberts Westropp, Kt. C. J. and Mr. Justice F. D. Melvill.*

RAVJI BALA (plaintiff) v. LAL HUSANBHAI, deceased, his son and heir BANDYA, minor, by his guardian SAKHINABAI. †

Jurisdiction—Village Munsiff—Rent suit.

A village Munsiff has no jurisdiction to entertain a suit for rent.

This is a reference from Dr. A. D. Pollen, Special Judge under Act XVII of 1879.

The village Munsiff not having jurisdiction to entertain a suit for rent (see the printed judgment for 1880, page 228, Vithal against Gangaram, Civil Reference No. 14 of 1880 (1), the High Court quashes the decree and proceedings in the present suit, No. 3 of 1880, wherein Ravji bin Bala Dhole is plaintiff, and Lal Husanbhai Tamboli, deceased, by his son and heir Bandya, a minor, is defendant. The village Munsiff should return the plaint to the plaintiff in order that if he be so advised he may present the same to the Court having primary jurisdiction.

November 23. *Before Mr. Justice M. Melvill and Mr. Justice Nanabhai Haridas.*

NARO KESHAV (defendant) Appellant v. BALAJI PADMAKAR (plaintiff) Respondent. *

Mortgage—Possession—Priority.

Where a mortgagee enters into immediate possession he will have precedence over another mortgagee who enters into possession subsequent to the former and the latter mortgagee be prior in point of date.

† Civ. Ref. No. 29 of 1880 (P. 302 of P. J. 1880.)

* Appeal No. 345 of 1880 (P. 303 of P. J. 1880.)

(1) 5 Bom. 180.



This is a second appeal from the decision of C. B. Izon, Esquire, District Judge of Ratnagiri, in Appeal No. 154 of 1879.

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The Lower Court has found that the plaintiff's possession is proved, and consequently that his mortgage takes precedence of the mortgage to the defendant. But it is to be observed that the plaintiff in his plaint admits that he did not obtain possession until the 4th May, 1873, which is a date subsequent to the mortgage to the defendant. It follows that, if, as the defendant alleges, he himself obtained possession on the 14th February, 1873, (the date of his mortgage), the defendant's mortgage, being accompanied by immediate possession, would be entitled to precedence over the plaintiff's mortgage, notwithstanding the priority of the latter in point of date. Some evidence tendered by the defendant on this point appears to have been rejected by the Subordinate Judge, as irrelevant : but we are of opinion that the defendant is entitled to have this evidence received and considered, and the question of possession determined.

We, therefore, direct the Court below, after receiving the evidence rejected by the Subordinate Judge, or such portion of it as may be legally admissible, to find on the following issue :—

Has the defendant proved that he took possession under his mortgage, Exhibit 23, previously to the date on which the plaintiff obtained possession under his mortgage, Exhibit 3 ?

Before Mr. Justice M. Melvill and Mr. Justice Nanabhai
Haridas.

November 22.

ANAJI WAGHOJI Applicant v. TATYA ANAJI
and others Respondents.*

*Practice—Procedure—Pauper suit, application for
leave to file—Limitation.*

Where, on the face of an application for leave to sue as a pauper and on the plaintiff's own allegation, he has a right to sue the application cannot be rejected on the ground that from certain evidence produced it appeared that the suit was time-barred.

* Extra. Application No. 59 of 1880 (P. 310 of P. J. 1880.)

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ATMARAM BAJI

vs.

MADHAV-RAV BAPUJI

This is an application from the order of Rav Bahadur Purshotam Sidheshwar, First Class Subordinate Judge of Satara, dated the 5th April, 1880, in Application No. 85 of 1879.

On the face of the plaintiff's application, and according to his own allegations, he had a right to sue. Under these circumstances it was not competent to the Subordinate Judge to reject the application on the ground that from certain evidence produced it appeared that the suit was time barred. The effect of such an order would be to deprive the applicant of the power to bring the question before the Appellate Court. Having found that the applicant was a pauper, and their being nothing in his application which negatived his right to sue, the Subordinate Judge should have granted the application, and registered it as a plaint. The case must now be remanded, in order that this may be done.

It must be remarked that, in disposing of the question of limitation, the Subordinate Judge has taken no notice of what appears to be really the plaintiff's case, viz., that subsequently to the suit of 1848, he was re-admitted by the defendants into joint enjoyment of the property, and that a new cause of action accrued to him upon a subsequent exclusion within 12 years preceding his application.

The Subordinate Judge's order is reversed, and case remanded. Costs of this application to be costs in the cause.

November 24.

*Before Sir Michael Roberts Westropp, Kt. C. J. and
Mr. Justice F. D. Melvill.*

ATMARAM BAJI (plaintiff) Appellant v. MADHAV-RAV BAPUJI and others (defendants) Respondents.*

Hindu Law—Partition, evidence of—Adverse possession.

It is not uncommon for certain members of a Hindu family to hold or occupy particular portions of the ancestral property and certain other members to hold other portions although no partition of the estate has been made and the right to it continues. Exclusive occupation or enjoyment is evidence of partition but where, notwithstanding the existence of such occupation or enjoyment, there is an expressed agreement that the portion so occupied and enjoyed shall be regarded

* Appeal No. 167 of 1880 (P. 311 of P. J. 1880.)

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as undivided, that agreement rebuts any inference from a mere continuation of the same occupation and enjoyment which existed before and at the time of the agreement and something more is necessary to show that there is adverse possession.

This is a second appeal from the decision of W. H. Newnham Esquire, District Judge of Poona, in Appeal No. 121 of 1879.

It is admitted by all parties that house, the subject of this suit, was the property of Bapuji Oke who died *circa* A. D. 1857, and that it then descended upon his sons in co-parcenership. The Courts below have, as we think, correctly described this suit as one seeking a partition, on which partition the plaintiff claims to have three-fourths of the house allotted to him as purchaser of the shares of Ganesh and Keshav, two of the sons of Bapuji Oke, and of Purshotam and Vasudev, sons of Trimbak, another son of Bapuji Oke. It is not quite clear whether or not the Courts below held these purchases to be proved. They incline apparently towards the fact of the purchases having been made, but have held the suit to be barred by the law of limitation. The act applicable to this suit is Act IX of 1871, the plaint having been presented on the 29th September, 1877, and Act XV of 1877 not having come into force until the 1st October, 1877. The Articles of Schedule II of Act IX of 1871 applicable would be either 127, 136 or 145. If the possession of the first defendant Madhavrav were not adverse to his brothers and nephews at the time of the sales by them to the plaintiff, Article 136 would not be applicable, inasmuch as the possession of Madhavrav would in such case be the possession also of his co-parceners, and the sales would not be sales by a vendor out of possession within the meaning of that article. If we take Article 127 to be applicable, and that the plaintiff is to be regarded as "a Hindu excluded from joint family property" and seeking "to enforce a right to share therein," the period, whence the 12 years would commence to run, would be the date when the plaintiff claimed and was refused his share. Neither, however, of the Courts below has found as a fact that either the plaintiff or his assignors (Ganesh, Keshav, Purshotam and Vasudev) have claimed and been refused their shares twelve years before the finding of the plaint. If, as would seem to be the case

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Article 145 be that which is properly applicable, the plaintiff might bring his suit within 12 years from the time "when the possession of the defendant became adverse to the plaintiff," or (we should add) to his assignors, the co-parceners of Madhavrav. The District Judge has not found when the possession of Madhavrav first became adverse to those co-parceners or to the plaintiff. It is quite clear that neither on the 5th March, 1859, (1st Phagan Sudh Shak 1780) the date of Exhibit 27, nor down to the 17th June, 1860, the date of Exhibit 26, had Madhavrav's possession become adverse to his co-parceners. Those documents (27 and 26) were agreements for the partition of the family estate, but Exhibit 27 (the earlier of the two) expressly reserved the house in question as undivided property to be enjoyed by all of the co-parceners, and though Exhibit 26 made certain modifications of Exhibit 27, Exhibit 26 did not in any respect alter or modify the arrangement in Exhibit 27, that the house should be reserved as undivided property. It may be that, even at and before the dates of those documents, the defendant Madhavrav had the sole occupation or management of the house and of its rents and profits, but, in the face of Exhibit 27 and 26, it is impossible to hold that he then had possession of it adversely to his co-parceners. It was then treated and reserved as undivided property, and his possession was equally that of his co-parceners. It lay upon such of the defendants as rely on the objection of limitation to show how and when his possession became adverse to his co-parceners. No demand by his co-parceners under whom the plaintiffs claims, or by the plaintiff, more than 12 years before the 29th September, 1877, when the plaint was presented, is found to have been made, nor is any alteration, as regards the house, in the state of circumstances existing in 1859 and 1860, found to have occurred. The Subordinate Judge indeed says that for the last 20 years the co-parceners of Madhavrav " have had nothing to do with the house " and the District Judge says that Madhavrav has " managed, let it, and received the rents and profits for the last 12 years and more before the suit, " but unless there was, since 1860, and more than 12 years before the plaint was presented, such an alteration in the state of circumstances which exist-

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ed in 1860 as to render his possession adverse to his co-parceners of the plaintiff, such sole management &c. does not amount to a severance of the joint tenancy. For, that management &c. subsisted at the time when the co-parceners agreed that the house should continue to be held in joint tenancy. Something more must be clearly shown to have happened in order to supersede their express agreement. It has not been shown to us, that, in lieu of the undivided shares of the co-parceners in the house, any equivalent in the other portions of the family property has been conceded to them by Madhavrav. It has been said that the agreements 27 and 26 have not been fully carried into execution by the parties to them. That may be so, but it has not been alleged that the right to have those agreements specifically performed or in lieu thereof to have the family estate (including the house) divided in due course of law has been abandoned by the co-parceners. It is no uncommon thing for certain members of a Hindu family to hold or occupy particular portions of the ancestral property, and certain other members to hold other portions, although no partition of the estate has been made, and the right to it continues. No doubt, exclusive occupation or enjoyment is regarded as evidence of partition, but where, notwithstanding the existence of such occupation or enjoyment, there is an express agreement that the portion so occupied and enjoyed shall be regarded as undivided, that agreement rebuts any inference from a mere continuation of the same occupation and enjoyment which existed before and at the time of the agreement, and something more is necessary to show that there is adverse possession. In order that this case should, with regard to the above observations, be reconsidered by the District Court on the question of limitation, and that, if on such reconsideration that point be decided in favour of the plaintiff, there should be a decree on the merits, we reverse the decrees of the Courts below, and remand the cause for a new trial. It is settled law that, in this Presidency, a coparcener may, for valuable consideration, alien his undivided share in Hindu family estate (1). In allotting to the as-

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(1.) 10 Bom. H. C. Rep. 139, 162 ; 11 Bom. H. C. Rep. 72, 76
recognized by the Privy Council in L. Rep. 6 Ind. Appls. 101, 102, 103
et seq.



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signee from a co-parcener a share in a particular portion of the family estate, the observations beginning at page 80 and ending at page 83 in the report of Udaram Sitaram vs. Ranu Panduji (2) should be carefully considered and followed, especially those at page 82. The costs of the suit and both appeals should be disposed of on the new trial in such manner as may be just. Should it be necessary to add any new parties for the purpose of a complete partition, the District Judge may cause them to be added. He may also take such further evidence (if any) as he may deem necessary for that trial.

December 7.

Before Sir Michael Roberts Westropp, Kt., C. J. and Justice F. D. Melvill.

GOSAI HIRAGAR PITAMBARGAR, deceased, by
the administrator of his estate, the Collector of
KAIRA Plaintiff v. RANCHHODE (SANKAR
et al Defendants.

*Certificate of administration, Collector in official capacity—
Bom. Reg. VIII of 1827—Act XX of 1864—Jurisdiction—Suit against Collector.*

Regulation VIII of 1827 does not contemplate the appointment of a Collector as the administrator of the estate of a deceased person in his official capacity as Collector in the same manner as Act XX of 1864.

If a Collector originally appointed under the Regulation is succeeded by another gentleman the latter would not be warranted in acting as administrator of the deceased without a revocation of the grant to the former Collector and a fresh appointment of his successor administrator. A Subordinate Judge has jurisdiction to entertain a suit against a Collector appointed an administrator under the Regulation.

This is a reference from Rav Saheb Harilal Chhaganlal Satyavadi, Subordinate Judge of Nariad, under Section 617 of Act X of 1877.

Regulation VIII of 1827 does not contemplate the appointment of a Collector as the administrator of the estate of a deceased person in his official capacity as Collector, whereas Act XX of 1864 does provide for the appointment

(2.) 11 Bom. H. C. Rep. 76.
* Civ. Ref. No. 28 of 1880 (P. 320 of P. J. 1880).

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of a Collector in his capacity as such to be the administrator of the estate of a minor. The Collector can be appointed administrator under Regulation VIII of 1827 simply as any other individual may be appointed under that Regulation. The circumstance that, in the certificate of appointment, he has been described merely as Collector of Kaira, does not alter the case. The Court must be regarded as having appointed him administrator in his individual capacity. It had not any power under the Regulation to appoint him in a quasi corporate capacity. If the Collector, originally appointed, was succeeded by another gentleman as Collector, the latter would not be warranted in acting as administrator of the deceased without a revocation of the grant to the present Collector, and a fresh appointment of his successor as administrator. In a recent case (Civil Reference No. 6 of 1880 (1)), we declined to treat a Nazir, who had been appointed administrator of the estate of a minor under Act XX of 1864, as an officer of Government appointed such administrator in his official capacity. Act XX of 1864 does not warrant the appointment of a Nazir as administrator in his official capacity. He could only have been appointed under that Act as a fit and proper person to perform the duty of administrator of the minor, i. e., in his private capacity. The principle, on which the Nazir's case was decided under that Act, applies to the Collector appointed administrator of the estate of a deceased person under Regulation VIII of 1827. We hold that the circumstance that the administrator appointed in the present case under that Regulation, is the Collector, does not deprive the Subordinate Judge of jurisdiction.

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*Before Mr. Justice Melvill and Mr. Justice Nanabhai
Haridas.*

December 8.

BHOWSAR TRIBHOVAN JECHAND (plaintiff)
Appellant v, BHOWSAR JEBHAI MADHAVJI
(defendant) Respondent. *

*Jurisdiction—Partnership, suit for—S. 265 of Act IX
of 1872—Parties.*

- • Appeal No. 28 of 1880 (P. 321 of P. J. 1880.)
- (1) P. J. 1880. p. 143.; 4 Bom. 638

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BOMBAY HIGH COURT

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**BHOSAR TRI-
BHOWAN.**

**BHOSAR JE-
BHAI.**

A suit by one partner, after the termination of a partnership, to recover his share of the assets, must, under S. 265 of the Contract Act IX of 1872, be brought in the District Court, and all the partners must be made parties.

This is an appeal from the order of S. H. PHILLPOTTS, Esquire, District Judge of Ahmedabad, in Appeal No. 74 of 1879.

The order of the District Judge appears to be right. The suit was brought by one partner, after the termination of a partnership, to recover his share of the assets. Section 265 of the Indian Contract Act requires, that such a suit should be brought in the District Court. The suit was improperly constituted, as all the partners ought to have been made parties. The plaintiff should amend his plaint accordingly and should also bring it into conformity with the terms of Section 265, before he presents it again in the District Court.

Order confirmed with costs.

December 8. *Before Sir Michael Roberts Westropp Kt., C. J. and Mr. Justice F. D. Melvill.*

**UKA BHAGWAN (plaintiff) Appellant v. BAI
HETA (defendant) Respondent. ***

*Restitution of conjugal rights—Cruelty—Unfounded
charge of bigamy and theft.*

Where a Hindu husband beat and expelled his wife from his house and also charged her falsely with theft and bigamy, and the Courts below had arrived at the conclusion that it would be dangerous to the personal safety of the wife to send her back to live with her husband, the High Court refused to interfere although the evidence of cruelty was not so specific or strong as might be desirable.

This is a second appeal from the decision of S. Tagore, Esquire, Acting Judge of Surat in Appeal No. 280 of 1877.

The Courts below have found that the Plaintiff beat his wife and expelled her from his house. It also appears that he charged her with theft of ornaments and subsequently charged her with bigamy. Of both of those accusations she has been acquitted, and, under all of the circumstances, both of the Courts below (each being presided over by a

S. A. No. 344 of 1880 (P. 322 of P. J. 1880.)

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Hindu gentleman) have arrived at the conclusion that it would be dangerous to the personal safety of the Hindu Defendant to send her back to live with her Hindu husband. Although the evidence of the cruelty is not quite so specific or strong as might be desirable, yet inasmuch as it has not been seriously questioned in cross-examination, we do not feel ourselves at liberty to interfere with the decrees of the Courts below. The character of the Defendant has not been such as to induce us to give her the costs of this appeal, although we do not interfere with the decrees of the Courts below as to costs.

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Uka

Bai Heta,

Before Sir Michael Roberts Westropp Kt. C. J and Mr.
Justice F. D. Melvill. and Mr. Justice Nanabhai
Haridas.

November 80.

HORMUSJI GANDABHAI Plaintiff v. DAYABHOY
HARRIBHOY Defendant. *

Stamp—khata agreeing to pay debt of third person.

A khata passed by one person in favour of another, agreeing to pay a debt due by a third person requires a stamp of eight annas.

This is a reference from Rav Saheb Chunilal Maneklal, Subordinate Judge of Bulsar, under Section 49 of Act I of 1879.

The question put in the reference was "whether a khata passed by one person in favour of another, agreeing to pay a debt due by a third person requires a stamp, and, if it does, of what value ?

The Subordinate Judge's opinion was as follows :—

"The universal practice amongst the money lenders in this District is to regard such instruments as mere acknowledgments of debts, but looking to Government Resolution No. 2935 of 1878, dated 15th May. 1878, I think that acknowledgment within the meaning of Article 5 of Schedule II, Act XVIII of 1869, must be of money actually due. I am of opinion that the khata sued upon is an agreement on the part of the defendant to pay a debt due by a third person to the plaintiff, and, as such, requires a stamp of 8 annas."

* Civ. Ref. No. 20 of 1880 (P. 324 of P. J. 1880.)



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The khata was in the following form:—

“ Khata of Mehta Dayabhai Haribhai Umersadivala for the year Sal 1933.
Cr.

Dr.

9 0 0 On Akhad Sud 1st, a transfer of debt (Havalala) Patel Lallu Bhagvan Tukvadavala, per himself, in his own handwriting.

(Signed) Mehta Dayabhai Haribhai in his own handwriting.”

The Court agrees with the Subordinate Judge in the opinion that the khata requires a stamp of 8 annas.

December 7.

Before sir Michael Roberts Westropp, Kt., C. J., and Mr. Justice F. D. Melvill.

KIRPASHANKAR HARISHANKAR Judgment Creditor v. GOVIND HARIBHAI Respondent.

Standing crops—Execution of decree.

Standing crops are immoveable property and should be so treated in the execution of decrees.

This is a reference from Rav Saheb Madhuvachram Balvachram Hora Subordinate Judge of Borsad, under Section 617 of Act X of 1877.

Following its decision in Civil reference No. 17 of 1880, (1) this Court holds that standing crops are immoveable property and should be so treated in the execution of decrees.

December 14.

Before Sir Michael Roberts Westropp, Kt., C. J. and Mr. Justice Nanabhai Haridas and Mr. Justice F. D. Melvill.

VITHOJI SOMAJI Plaintiff v. TUKARAM GANGAJI Defendant.†

Stamp—Lease—Stamp Act XVIII of 1869.

S. 3, cl. 15, Sch. I., art. 15.

An instrument by which the party executing it agrees to take land for 10 years rent-free, and to surrender it at the end of that term, but, if he overholds to pay Rs. 160 per annum in respect of the land so long

° Civ. Ref. No. 30 of 1880 (P. 329 of P. J. 1880.)

† Civ. Ref. No. 35 of 1880 (P. 331 of P. J. 1880.).

(1) 5 Bom. 184.

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as he overholds, is a lease within the meaning of S. 3, cl. 15 of Act XVIII of 1869 and article 15 of Schedule I of that Act shows that the stamp duty payable on such a document is Re. 1.

This is a reference from E. P. Robertson, Esquire, Commissioner C. D. under Section 46 of Act I of 1879.

The portion of the instrument, the subject of this reference which mentions the surrender of the land named in that instrument, is mere matter of recital, and neither is nor operates as a release. By that instrument, the party, who executes it, agrees to take the land for ten years rent-free, and to surrender it at the end of that term, but, if he overholds, he promises to pay Rs. 100 per annum in respect of the land so long as he overholds. That is, in our opinion, no more than a lease within the definition given of the word "lease" in Section 3, Clause 15 of the Stamp Act XVIII of 1869. Under Schedule I of that Act Article 19, Clause C, a lease for a term exceeding three years is liable to the same duty as a conveyance for the total amount payable under such lease, during the first year of the term, is chargeable. In the present case, no rent is payable during the first year of the term. Even, however, if we were to regard the instrument as a lease for Rs. 100 per annum during the term, and Rs. 100 per annum so long as the lessee overholds beyond that term. Schedule I, Article 15 shows that the stamp duty payable is upon such a document only one Rupee. We are accordingly of opinion that the instrument is sufficiently stamped and that the extra stamp duty and penalty aggregating Rs. 77 have been levied by the Mamlatdar illegally and must accordingly be refunded to Vithu bin Somaji from whom that sum was taken.

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TUKARAM.

Before Sir Michael Roberts Westropp, Kt., C. J., and Mr. Justice F. D. Melvill and Mr. Justice Nanabhai Haridas.

December 14.

HIRALAL AMTHA and others Plaintiffs v. KALIDAS ASARAM Defendant.*

Stamp—Penalty—Promissory note payable otherwise than on demand—Act XVIII of 1869 Ss. 20, 24, 28, Sch. 1, art 2.

A khata amounting to a promissory note payable otherwise than on demand, and exceeding Rs. 100 but not exceeding Rs. 200 is liable to a

* Civ. Ref. No. 31 of 1880 (P. 333 of P. J. 1880.)

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stamp duty of 2 annas under Act XVIII of 1869 Sch. 1. art. 2, and § 28 of that Act precludes the application of Ss. 20 or 24 to such a document which, if unstamped, cannot be admitted in evidence on payment of additional stamp duty and penalty.

This is a reference from RAV SAHEB MADHAWACHRAM BALWACHRAM, Subordinate Judge of Borsad, under Section 49 of Act I of 1879.

The Court is of opinion that the so-called khata amounts to a promissory note and being for Rs. 171-8½ i. e. for a sum payable otherwise than on demand (viz. within ten days) and exceeding Rs. 100 and not exceeding Rs. 200, was liable to a stamp duty of two annas under Act XVIII of 1869, Schedule I, Article 2, and that Section 28 of that Act precludes the application of the provisions of Section 20 or 24 to this case. The Subordinate Judge therefore cannot accept the additional stamp duty and the penalty, and the khata was not receivable in evidence.

December 1.

*Before Sir Michael Roberts Westropp, Kt., C. J. and
Mr. Justice F. D. Metvill.*

**BABAR HARIBHAI and others (plaintiffs) Appellants v.
NATHU BHUKHANDAS and others (Defendants)
Respondents.***

*Right to sue to abate nuisance—Estoppel—Concurrence
—Attestation of deed.*

A plaintiff is entitled to sue where he complains that a portion of a *pol* or *mohla* belonging to the inhabitants of the houses in the *mohla* as tenants in common, has been monopolised by one of them by building a shed thereon to the exclusion of the others, where the cases put forward by both parties are inconsistent with the *pol* or *mohla* being a public street or *mohla*.

Mere attestation of the deed of sale does not necessarily import concurrence in the alienation.

This is a second appeal from the decision of A. H. UNWIN, Esquire, Acting Assistant Judge of Ahmedabad, in Cross Appeals Nos. 12 and 15 of 1879.

The Assistant Judge has relied on the decision in *Bechar Jetha and others vs. Tribhovan Jeychand and another* (1), but there the *Dharmasala*, though built by private subscrip-

• S. A. No. 325 of 1880 (P. 335 of P. J. 1880.) •
(1.) 2 P. J. 377.

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tion, had been dedicated, by the subscribers, to the public. He also cited Basoda Prasad vs. Gorachand (1) which was a suit relating to a road dedicated by the plaintiff and others to the public. In the present plaint there is not any allegation that the pol or mohla has been dedicated to the public at large. It is alleged by the plaintiff to belong to the inhabitants of the houses in the mohla, and the plaintiffs complain that a portion of that which belongs to those inhabitants as tenants in common has been monopolised by one of them (the first defendant) by the building of a shed thereon to the exclusion of the others. That is quite a different case from the two cases relied upon. It is no mere obstruction of the right to use a public road or space, but is an alleged ouster from possession of several tenants in common by one. Nor does the 17th Section (Clause f) of the Bombay District Municipal Act aid the defendants. Although it vests "all public streets and spaces " in the Municipality, it has not been either alleged in the plaint, or, as we understand, proved in fact that the mohla or pol is a public street or space. The cases put forward by both parties are inconsistent with the mohla or pol being a public street or space. The plaintiffs insist that it belongs to the inhabitants thereof as tenants in common. The first defendant claims the portion in dispute as his private property, and the second defendant also claims it as his private property. The fourth, fifth and sixth defendants are stated here by their pleader to coincide with the plaintiffs. The third and seventh defendants have not appeared.

The Assistant Judge has further held that the first plaintiff is estopped by his attestation of the deed (Exhibit 12) (where by Kahandas Dharamdas purported to sell a portion of the ground in dispute to the second defendant) from denying the validity of the title of that defendant to that portion. But the Privy Council in Raj Lukhee Dahee vs. Gokul Chunder Chowdhary (2) say: " Their Lordships cannot affirm the proposition that the mere attestation of such an instrument, (a deed of sale) by a relative, necessarily imports concurrence. It might, no doubt, be shown by other evidence, that when he became an attesting witness, he fully understood what the transaction was, and that he was a concurring

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(1) 3 Beng. L. R., 295 A. J. (2) 13 Moore Ind. App. p. 229.



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v.
NATHU. party to it, but from the mere subscription of his name that inference does not necessarily arise. To the same effect are the cases at page 10 of our Printed Judgments for 1875 in Special Appeal 151 of 1874, (1) and at the page 94 of the Printed Judgments for 1880 in Second Appeal 264 of 1877, and in Salamat Ali vs. Budh Singh (2).

We must reverse the decree of the Assistant Judge and remand this cause for a new trial on the merits. Costs of suit and all of the appeals should, at such retrial, be disposed of in such manner as may be just.

December 15.

*Before Sir Michael Roberts Westropp, Kt., C. J.,
and Mr. Justice F. D. Melvill.*

RAV RAJE Sir DINKARRAV RAGHUNATH SAHEB
Appellant v. **KASINATH ANTAJI**, deceased, his
son and heir **GANESH** and others Respondents.*

Practice--- Pleader, appointment of, delegation of power of.

There is nothing in the Civil Procedure Code, Act X of 1877, to interfere with the general rule of law that a man may appoint his own solicitor or pleader, or may delegate to another person the right to do so, and it is not reasonable that the delegate may not exercise the special power to appoint a solicitor or pleader, because he has not a general power of attorney.

This is an appeal from the order of Rav Bahadur Narayan Govind, First Class Subordinate Judge of Ahmednagr, dated 4th September, 1880, in Civil Suit No. 390 of 1880.

The 36th Section of the Civil Procedure Code of 1877 (as amended by Act XII of 1879) sanctions appearances, applications, or acts in any Court by "the party in person or by his recognised agent, or by a pleader duly appointed to act on his behalf."

Section 37 does not relate to the appointment of pleaders. It is limited to recognised agents. The only limitation contained in the Code as to the appointment of a pleader is in the 39th Section, which directs that the appointment shall be in writing and that it shall be filed in Court (both of which requisites have been complied with here). Further than this the Code does not state what shall be a duly made appointment of a pleader. The 39th Section prescribes the

* Appeal No. 38 of 1880 (P. 338 of P. J. 1880.)

(1) 2 P. J. 4.

(2) 1 All. 303.



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time during which the appointment shall be considered to be in force.

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KASINATH.

The appointment of the pleader in the present case has been made by Mr. Vishnu Mahadev Lele—a gentleman not only authorised by the plaintiff “to file and conduct any civil or revenue suit or any appeal in any Court, and to take any legal proceedings, revenue or judicial, therein” for him (the plaintiff) against the present defendants “relative to the damages &c., occurred in my (the plaintiff’s) inam villages (of which he names seven) in the District of Ahmednagar,” but of whom the plaintiff adds: “I declare that his legal actions in these matters including the appointment of any vakil may be considered as my own.” There is then here an express authority to Mr. Vishnu Mahadev Lele to appoint a pleader (vakil) to conduct any such suit as is embraced by the power of attorney. The question is not whether Mr. Vishnu Mahadev Lele is under that power of attorney to be regarded as a recognised agent, such as is contemplated by Section 37, but whether the pleader appointed by him has not been duly appointed. We see nothing in the Code to interfere with the usual rule of law that a man may appoint his own solicitor, or pleader or may delegate to another person the right to do so ; and it does not seem reasonable that the delegate may not exercise the special power to appoint a solicitor or pleader, because further and other powers have or have not been conferred upon him, *ex. gr.*, that he has not a general power of attorney. Unless it were expressly laid down in, or most clearly implied by, the Code that such is the law, we should refrain from laying down any such narrow and, as we think, mischievous rule. It may well be that many men would willingly authorise a person to select a solicitor or pleader for them, but would not at all desire to confer upon such person a general power of attorney to do all acts for the appointor as if he (the appointee) were the appointor himself. We are of opinion that, if the power of attorney in this case had been limited to an authority to Mr. Vishnu Mahadev Lele to appoint a pleader to bring suits of the particular kind against the particular persons (the present defendants) named in it, a pleader appointed by Mr. Vishnu Mahadev Lele under it to bring

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KASINATH. those suits would have been "duly appointed" to act on behalf of the plaintiff in those suits, and we fail to perceive that the circumstance that the power of attorney purports to give to Mr. Vishnu Mahadev Lele further authority (although it may not amount to a general power of attorney) can affect his rights to nominate a pleader for the plaintiff. We do not consider it necessary to give any opinion whether Mr. Vishnu Mahadev Lele is "a recognised agent" of the plaintiff in the special sense given to that term by Section 37 of the Code.

We also differ from the Subordinate Judge as to the meaning of the words "first hearing." He himself admits that "the hearing of the suit was adjourned," and we consider that there had been in fact only one hearing up to the time of the application to him for leave to amend the plaint, and that such application was made to the Subordinate Judge during that hearing.

We reverse the decree of the Subordinate Judge, and direct him to proceed to hear the cause on the merits. Costs of this appeal and of the suit are to follow the final result of the trial on the merits.

December 20. *Before Mr. Justice M. Melvill and Mr. Justice Nanabhai Haridas.*

**DOLATRAM MANECKCHAND (plaintiff) v. NAHAN-
CHAND MANECKCHAND (defendant) Respondent.***

Damages—Exclusion from joint property.

A purchaser of a moiety of a house is entitled to a reasonable compensation as damages for having been kept out of possession of his moiety.

This is a second appeal from the decision of A. H. Unwin, Esquire, Acting Assistant Judge of Ahmedabad, in Appeal No. 124 of 1879.

We think that plaintiff is entitled to reasonable compensation for having been kept out of possession of the moiety of the house which he had purchased. It is not now contended that he is not entitled to a moiety, and a partition has accordingly been decreed. On the 9th March 1876, the plaintiff gave notice to the defendant requiring him to make

* S. A. No. 365 of 1890 (P. 343 of P. J. 1880.)



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over the half of the house, on the left side of the entrance, and informing him that he would be held responsible for rent if he failed to give possession. It is true, as the Courts below have found that the plaintiff was not entitled to say that he had a right to a particular side of the house. But the defendant, in his reply to the notice, took no objection to the demand upon this ground. Had he done so, and had he offered to submit to an equitable partition, the plaintiff would no doubt have acquiesced. The objections which the defendant did take to the demand were such as could not be maintained, and can only be regarded as having been interposed for the purpose of vexation and delay. The value of the plaintiff's moiety of the house is estimated by himself at Rs. 162, and we think that he is entitled, as mesne profits, to such a fair rental as he might have realised by letting this portion of the house. We, accordingly, amend the decrees of the Courts below, and award to the plaintiff damages calculated at the rate of nine per cent, per annum on Rs. 162, from the 9th March, 1876, to the date when partition may be carried out, and the plaintiff be placed in possession of the moiety of the house.

The parties to bear their own costs throughout.

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NANABHAI. December 22.

GANESH MORESHWAR (plaintiff) Appellant v. GAJAI, mother and guardian of minor SAKHOB, son and heir of BAHIRU *et al* (defendants) Respondents. *

Res judicata—Identity of cause of action.

The dismissal of an ejectment suit against A. as a trespasser, is no bar to a suit against A's heir to recover the property on the ground that as A. held the land for maintenance only, the plaintiff is entitled to recover it on A's death.

This is a second appeal from the decision of R. F. Mactier, Esquire, District Judge of Satara, in Appeal No. 23 of 1880.

In the former suit the plaintiff tried to eject Bahiru, as a trespasser, and failed. In that suit Bahiru, among other grounds of defence, maintained that he was entitled to hold

* S. A. No- 352 of 1880 (P. 344 of P. J. 1880.)

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the land for his maintenance, inasmuch as he was the illegitimate son of the last owner. The plaintiff now brings another suit after Bahiru's death on the ground, that, as Bahiru held the land for his maintenance only, he (the plaintiff) is entitled to recover it upon Bahiru's death. Whether this constitutes a good cause of action, or not, it is at all events a fresh cause of action, and one which could not have been made ground of attack in the former suit, which was brought in Bahiru's life-time. It can not, therefore, properly be held that the matter in issue in the present suit was heard and decided in the former suit. We, accordingly, reverse the decree of the District Court, and remand the case, in order that it may be decided whether the land in dispute was held by Bahiru for his maintenance, and, if so, whether the plaintiff is entitled to recover it from the person persons in whose possession it now is.

Costs to follow final decision.

December 29.

Before Mr. Justice M. Melvill and Mr. Justice Nanabhai Haridas.

**TRIMBAKRAJ SAHADEVSHET (plaintiff) Appellant
v. The General Traffic Manager of the G. I. P. Ry. Co.
(defendant) Respondent.***

As a rule, when proceedings have been *bona fide* taken for obtaining a review of judgment, the time so occupied, ought to be excluded from computation in reckoning the period of limitation allowed for an appeal. But if the application for review is presented on the last day allowed for appeal and if the appeal is not presented until seven days after the rejection of the review application no such allowance could be made and the appeal should be rejected as time-barred.

This is a second appeal from the decision of H. F. Aston, Esquire, Assistant Judge, F. P., of the District of Thana, dated the 13th April, 1880.

The order of the Assistant Judge dismissing the appeal is as follows:—

“ The appeal is dismissed under Section 4, Act XV of 1877, being admittedly presented after the expiration of the period of limitation prescribed therefor, and the explana-

° S. A. No. 496 of 1880 (P. 345 of P. J. 1880.)

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tion offered that an attempt was being made to obtain a review of the decision appealed against not being, in the opinion of the Court, a satisfactory one. ”

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vs.

THE G. I. P. RAILWAY COMPANY
THE G. I. P. RAILWAY COMPANY
MANAGER OF
THE G. I. P. RAILWAY COMPANY

If the Assistant Judge had said that, under no circumstances ought the presentation of an application for review to be regarded as a sufficient cause for delay in preferring an appeal, we might perhaps have held that there had been a misuse of discretion amounting to an error in law. For, we think that, as a rule, when proceedings have been *bona fide* taken for obtaining a review of judgment, the time, which may have been reasonably occupied in such proceedings, ought to be excluded from computation, in reckoning the period of limitation allowed for an appeal. This is the view which has been taken by the Calcutta High Court (2 W. R., Misc. Ap. 36; 7 W. R., 529; 22 W. R., 79); and it would appear to be in accordance with the practice of the Madras Court also.

But we understand the order of the Assistant Judge as meaning nothing more than that, under the circumstances of the present case, the attempt which had been made to obtain a review was not a sufficient excuse for the delay in presenting the appeal. And we find it impossible to say that the Assistant Judge's order, so interpreted, involved any error in law. The application for review was not presented until the very last day allowed for appeal; and the appeal was not presented until seven days after the rejection of the application for review. Even, therefore, if the time occupied in the review were excluded from computation, (and this is the utmost indulgence which, under ordinary circumstances, could be extended), the period allowed for appeal would still have been exceeded by several days.

Order confirmed with costs.



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Where therefore objection was taken in the Courts below to the validity of the sale by the mother and *de facto* guardian of a minor, but not on the ground that according to Mahomedan Law she was not competent to assume the office of administratrix to her infant son's estate, and therefore had no power to sell it and where the sale had been made in good faith and under the pressure of a necessity which would have otherwise in all probability led to the extinction of the minor's estate, it was held to be too late to take such an objection in appeal.

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ATTORNMENT by mortgagor.

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1.—*Bhagdari tenure.*] An allegation by the defendants, who cultivated land admittedly included in the plaintiff's *bhag*, that they held independently of the *bhagdar* and as tenants of the Government, paying assessment, and assessment only to the Government is inconsistent with the tenure of a *bhagdari* village. If not inferior *bhagdars*, they must from the constitution of *bhagdari* villages, be treated as *ganotias* or tenants, and liable to pay rent to the *bhagdar*,
Eduhji V. Muhamad ... 329

2.—*Bhagdari tenure—Alienation of part of Bhag—Bom. Act V of 1862, S. 3.*] Where the owner of an entire *bhag* succeeds by inheritance to a share of a survey number, which the Revenue authorities proceed to incorporate with original *Bhag*, this will not prevent the owner from alienating the original *Bhag*. Such an alienation is not contrary to the provisions of S. 3 of Bombay Act V. of 1862. There is nothing in that Act which empowers the Revenue authorities to alter or add to existing recognized sub-divisions. Much less can the inference be deduced from that Act that the Revenue authorities are empowered to add the property of A to that of B. so as to prevent the amalgamated properties of A. and B. from being liable to the ordinary incidents of property, i. e.. sale, mortgage or alienation.
Amanji v. Javher. ... 282

BHATTA, payment of.

See Limitation 10.

BOM. Act V of 1862, S. 3.

See Bhagdari Tenure 2.



BOM. Act. VII of 1863, sanad under.

See Declaratory decree.

BOM. Act I of 1865, Ss. 34, 38.

See Landlord and tenant 1.

BOM. Act IV of 1868, s. 11

—————“*All roads and lanes*” Highway—*Public Road—Title to soil—Dedication to public.*] The words “all roads and lanes” in S. 11 of Bombay Act IV of 1868 mean all roads and lanes which have been dedicated to the public, and do not include private roads and lanes which have not been so dedicated. If roads or lanes in a town or city have been dedicated to the public, they, by that section, vest in Government, and a former private owner of the soil over which such road or lane passes cannot be regarded as any longer the owner of so much of the soil as is occupied by the road. Dedication to the public may be express or implied. The most common mode in which a highway is supported, as being such, is by prescription. If all persons without distinction have indiscriminately for a considerable space of time, without interruption, used and enjoyed a way, such way will be presumed to be a high way. Collector of Surat *v.* Nasarvanji ... 328

BOMBAY ACT VI of 1873, S. 39 Cl. 1—Privy, Demolition or suppression of—Ultra vires.] Bom. Act VI. of 1873, s. 39, cl. 1 authorizes a Municipality to require the owner of a privy even though it may have been in existence from a period anterior to the coming into force of that Act to alter, repair or put such a privy in good order in such manner as the Municipality thinks fit. But it has no power to direct the demolition or suppression of any privy which was in existence before the Act come into force, and neither with nor without the sanction of Government has the Municipality any power to pass a bye law authorizing such demolition or suppression. Alteration, repair or cleansing such a privy is *intra vires* of the Municipality, but demolition or suppression is *ultra vires* of the Municipality.

Ahmedabad Municipality *v.* Gafarbai... 4

BOM ACT. III of 1878, S. 12. Fiscal Act—Construction—License tax illegally levied, suit to recover.] S. 12 of Bombay Act III of 1878 does not authorize a Collector to enhance the fee on a person presenting a petition as contemplated by S. 11. Though the words of S. 12 that the Collector may pass “such order thereon as he thinks fit” are large, yet the act being a fiscal act, must be construed strictly, and the words “order thereon” must be taken as meaning an order relevant to the petition, which an order enhancing the fee cannot be deemed to be. Where a Collector has levied an enhanced fee under such circumstances a suit will lie against him to recover the excess.

Punjabhai *v.* Collector of Kaira ... 352

BOMBAY Regulation II of 1827, S. 21, cl. 1.

See Jurisdiction 1.

BOMBAY Reg. IV of 1827.

See Custom.



BOMBAY Reg. VIII. of 1827.

See Certificate of administration. 1.

BOMBAY Reg. IX of 1827, S. 6, cl. 1.

See Registration 2.

BOMBAY Reg. X of 1827, S. 14.

See Registration 2.

BOMBAY Reg. XVII of 1827.

See Assessment, exemption from.

BURDEN of proof.

See *Onus Probandi*.

BOUNDARY.

Commissioner's decision, Finality of — Bom. Reg. X of 1827

s. 14.—The decision of the Boundary Commissioners appointed under Bom. Reg. X. of 1827 settling a question of disputed boundaries between two villages in a proceeding to which the Government are not the parties, is not final and conclusive as between the Government and the owner of villages when a dispute arises on a question of assessment. The finality spoken of in S. 14 of Bom. Reg. X. of 1827 is a finality for the purpose of the Regulation, amongst which purposes the assessability or extent of the assessment of land for Government revenue was not in any wise included.

Maharana Shri Jasvantsangji v. Collector of Ahmedabad. ... 30

CASTE question.

See Jurisdiction 1.

CAUSE of action.

See Right to sue.

See Declaratory decree.

See Jurisdiction 2-3.

See *Res judicata* 4.

CERTIFICATE of administration.

1.—*Collector in official capacity—Bom. Reg. VIII of 1827—Act XX of 1864—Jurisdiction—Suit against Collector.*—Regulation VIII of 1827 does not contemplate the appointment of a Collector as the administrator of the estate of a deceased person in his official capacity as Collector in the same manner as Act XX of 1864. If a Collector originally appointed under the Regulation is succeeded by another gentleman the latter would not be warranted in acting as administrator of the deceased without a revocation of the grant to the former Collector and a fresh appointment of his successor administrator. A Subordinate Judge has jurisdiction to entertain a suit against a Collector appointed an administrator under the Regulation.

Gosai Hiragar v. Ranchhode. ... 392

2.—*Necessity for Act XX of 1864—S. 440 of Act X of 1877—Disputed adoption.*—Act XX of 1864 is not superseded by Act X of 1877 and therefore the provision in S. 440 of the latter Act does not do away with the necessity for a guardian of a minor in the Bombay Presidency, who wishes to institute a suit on behalf of his ward obtaining a certificate of administration under Act XX of 1864. Where a minor has been adopted by a Hindu widow who appoints a person

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guardian of the minor by will, a certificate should not be refused to such person merely because the validity of the adoption may be disputed. On an application for a certificate by such guardian it is unnecessary to consider the question of the validity of the adoption.

Chintaman v. Sitaram. ... 249

3.—*Necessity for.*—Notwithstanding the general rules as to civil procedure contained in Act X of 1877, it is not competent to a person assuming the position of next friend without a due and legal recognition of his authority under the Minors' Act, to carry into effect a decree made on behalf of the minor represented by another person duly authorized.

Jagjivan v. Keval. ... 103

4.—*Act XX of 1864.*—Where a District Judge reversed the decree of the Subordinate Judge on the ground that the mother of the minor defendants had not obtained a certificate to administer the estate of her minor sons under Act XX of 1864, the High Court reversed his decree as made without jurisdiction.

Chinto v. Nagesh. ... 266

CERTIFICATE to collect debt.

—Appeal from order refusing.

See Appeal 3.

CESSER of service.

See Resumption and service tenure.

CHANGE of nature of suit.

See Mortgage 7.

CIVIL Procedure Code Act VIII of 1859.

—S. 7.

See Splitting cause of action 1.

—S. 206.

See Execution of decree 1.

—S. 243.

See Alienation by guardian 2.

CIVIL Procedure Code, Act X of 1877.

—S. 2 decree

See Appeal 3.

—S. 5.

See Procedure 1.

—S. 13, 111.

See Procedure 5.

—S. 53.

See Appeal 4.

—S. 53, Cl. C.

See Procedure 10.

—S. 56.

See *Ex parte* application to rehear appeal decided.

—S. 57.

See Procedure 13.

—S. 230.

See Limitation 9-11.



CIVIL Procedure Code Act X of 1877 S. 266.

See Execution of decree 5.

—S. 305.

See Sale in execution of decree 3.

—S. 312, para 2.

See Procedure 4.

—S. 313.

See Sale in execution of decree 6.

—S. 320.

See Execution of decree 1.

—S. 440.

See Certificate of administration 2-3.

—Ss. 483-5.

See Attachment before judgment.

—S. 489.

See Execution of decree 3.

—S. 588.

See Procedure 10.

—S. 617.

See Procedure 10-13.

—S. 622.

See Revision.

COEREION.

See Contract 2.

COLLECTOR, suit against.

See Certificate of administration 1.

COLOURABLE sale.

See Mortgage 7.

COMPROMISE of decree.

See Execution of decree 1.

CONDITIONAL adoption.

See Hindu Law—Adoption.

CONSENT.

See Jurisdiction 5.

CONSENT decree.

See Res judicata 1.

CONSIDERATION.

See Contract 3.

CONSTRUCTION of decree on mortgage.] Where the terms of a decree are susceptible of two constructions that should be adopted which is the more reasonable. A plaintiff should not be deprived of any of the usual remedies of a mortgagee unless it was expressly stated in the decree that the mortgaged property only was to be liable.

Ganpaya v. Narayanrav ... 20

CONSTRUCTION of Statute—fiscal.

See Bom. Act III of 1878. S. 12,

1.—Restrospective operation—Execution of decree.] Where an application for attachment was made and the warrant of attachment was issued before Act X of 1877 come into force :—*Held* that the judgment-creditor was entitled to have the warrant executed in the



CONSTRUCTION of Statute

same manner and to the same extent as if Act X of 1877 had not been passed.

Bai Talsa v. Bhaiji ...69

2.—*Retrospective effect—Act XII of 1879, Ss. 91, 102.*—S. 91 of Act XII of 1879, was not retrospective any further than it was made so by S. 102. The latter section did not affect the right of an applicant who had preferred his appeal to the District Court before the Act came into force to have his appeal heard and determined by that Court.

Bhavanrav v Gangaram. ... 344

CONSTRUCTIVE notice.

See Mortgage 1.

CONTINGENT claim, attachment of.

See Execution of decree 4.

CONTRACT.

———Breach by act of third party.

See Contract 1.

———Coercion.

See Contract 2.

———Consideration.

See Contract 3.

1.—*Breach of—Agreement to consent to application to raise attachment—Refusal by Court*]—A judgment-creditor agreed on certain terms to consent to an application to be made by the judgment-debtor for the removal of an attachment obtained by the judgment-creditor, and did so, but the application was rejected by the Court of first instance. An appeal and second appeal were also unsuccessful, but the High Court suggested that an application for review should be made to the lower Appeal Court. After three years an application for review was made. An objection was raised to the review application which was granted and the review application was rejected. Held that the judgment-creditor was not liable in damages for breach of contract. He was not bound after so long a delay to renew the consent he had formerly given, and was not responsible for the Court's refusal to give effect to the arrangement formerly agreed upon. When the High Court made its order, or at the latest when a moderate time had elapsed without the plaintiff (judgment-debtor) having acted on the suggestion made by the High Court, the judgment-creditor had a right to consider the order of the Court of First Instance as final, and to act on it as final. Dosibai. v. Ishwardas. ... 208

2.—*Coercion—Contract Act IX of 1872, Ss. 15, 165.*] Where a partner by detaining a large sum of money which was being sent by his co-partners to a creditor of the firm, caused them to execute a bond in his favour. Held, that the bond had been obtained by coercion and was therefore voidable under S. 15 of the Contract Act. S. 165 of that act is mainly for the protection of the bailee and will not protect a partner who for his private purposes, detains, or threatens to detain, partnership money or goods to the detriment of the partnership at large. Dinshaji v. Sheriadji. ... 372

3.—*Consideration.* The exclusive enjoyment by the defendant of the whole of land, admittedly the joint property of himself and

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plaintiff, is sufficient consideration for the defendant's promise to give the plaintiff one-half of the produce. *Yesaji v. Ganesh.* ... 119
CONTRACT ACT IX of 1872.

——— Ss. 15, 165.

——— *See Contract 2.*

——— S. 265.

——— *See Jurisdiction 6.*

——— *Form of application.*] No form of application under S. 265 of Act IX of 1872 is prescribed by the Act or elsewhere. It is immaterial if it be in the form of a plaint.

Devidas v. Narandas. ... 302

CONTRIBUTION.

See Acquiescence.

See Hindu Law—Partition 1.

COSTS.

——— Partition suit.

See Costs 1-2.

——— Security for:

See Security for costs,

——— Stranger to record.

See Costs 3.

1.—*Partition suit—Hindu Law, undivided family.*] The general and proper rule in a partition suit is that the costs of all proper parties should be borne by the estate, unless the conduct of a party should be so objectionable as either to justify his being deprived of his costs or ordered to pay those of one or more of the other parties.

Manakeband v. Nathu. ... 52

2.—*Partition suit—Mortgagee made party.*] Where in a partition suit a mortgagee of a portion of the family property, as to the liability to whom there is a dispute between the original parties, is made a party at the instance of the Court, he will be entitled to all costs of the suit and appeals as against the plaintiff, whose right to compel the original defendants to recoup him in respect thereof will depend on the question whether his share is bound by the mortgage.

Manadaji v. Govind. ... 229

3.—*Stranger to record—Extraordinary Jurisdiction.*] An Appellate Court cannot make an order directing some of the defendants, who are not parties to the appeal, to pay the plaintiff's costs. The High Court will interfere under its extraordinary jurisdiction to set aside such order.

Ramrav v. Ramji. ... 319

COUNTER claim.

See Procedure 5.

COURT of requests.

See Jurisdiction 4.

COVENANT to repair.

See Mortgage 2.

CREDITORS, sale to defeat,

See Mortgage 7.



CRUELTY.

See Restitution of conjugal rights 1.

CUSTOM.

See Timber 1.

— *Patilki family—Eldest member officiates—Bom. Reg. IV of 1827, S. 26.*]—The practice for the eldest member of a Patilki family to officiate is not the usage of a single family but of a large number of families forming an important class of the community and such a custom if clearly proved may well be regarded as part of “the usage of the country,” which, by S. 26 of Bom. Reg. IV. of 1827, the Courts are bound to recognize and enforce. *Sanganbasapa v. Sangapa. ...126*

DAMAGES.

See Mortgage 2.

— *Exclusion from joint property.*]—A purchaser of a moiety of a house is entitled to a reasonable compensation as damages for having been kept out of possession of his moiety. *Dolatram v. Nahanchand. ...402*

DEATH of defendant.

See Procedure 6-7.

— *Execution of decree after.*

See Execution of decree 9-11.

DEATH, presumption of.

See Evidence 5.

DECLARATORY decree.

— *Cause of action—Right to sue—Sanad under Bom. Act VII of 1863.*]—The issue of a Sanad under Bombay Act VII of 1863 is an act so seriously affecting the title, or at all events so seriously affecting the enjoyment of the property, as to give to the real owner a right to sue for a declaration of title against a person whose name has been erroneously entered in the Sanad, even though the real owner may be in undisturbed possession of the property. *Kaka v. Hussunali. ...298*

DECREE.

See Appeal 3.

— *Adjustment of. Out of Court.*

See Execution of decree 1.

— *Construction of.*

See Construction of decree.

— *directing annual payment, assignment of.*

See Assignment of interest under, decree directing annual payments.

— *payable by instalments.*

See Procedure 7.

DEDICATION to Public.

See Bom. Act IV of 1868, S. 11.

See Easement.

DEDUCTION of time occupied in former proceedings.

See Limitation 6.



DEVASTHAN.

See Endowment.

DIGNITY, suit to vindicate.

See Right to sue 4.

DISMISSAL of suit for default.

See Procedure 6.

————Of suit with leave to file fresh one.

See Res judicata 2.

DOCUMENTS more than 30 years old.

See Evidence 1.

DUTY of Court executing decree.

See Execution of decree 13.

EASEMENT.

————Limitation—Prescription.

See Limitation 4, 7.

————*Right of way—Dedication to public.*] A plaintiff's right to assert his title to land is not time-barred merely because people have been in the habit of passing over the ground for 20 years. That circumstance may be evidence from which a jury may presume a dedication to the public, or if such dedication be not proved, the plaintiff's free use of his ground may be restricted by the circumstance that other persons have acquired a right of way over it.

Lalbai v. President of Ahmedabad Municipality. ... 15

EAVES, limitation to suit to remove.

See Limitation 8.

See Hindu Law—Undivided family 1.

ENDOWMENT—Devasthan, *form of grant to.*] A grant expressed as conferring an *inam* to be enjoyed by the two lines of a Mahomedan Pir may yet be an ordinary temple (*devasthan*) grant and not confer a private disposable estate, or one which fails as an endowment on the extinction of the grantees.

Ravji v. Kazi Sayad Gulamudin. ... 43

ENHANCEMENT of rent.

1.—*By one of several Landlords—Objection raised, but no issue sought.*] One of several tenants-in-common, joint tenants, or co-parceners (unless he is acting by consent of the others as manager of an estate) is not at liberty to enhance rent or eject tenants at his pleasure. If such an objection is taken in the written statements, but no issue sought on that point in the lower Courts the defendant cannot be allowed to press it for the first time in appeal.

Raghu v. Govind ... 227

2.—*By joint landlord—Kabulayatdar Khot.*] The Kabulayatdar khot or khots for each year do not generally represent the estate for all purposes so as to enable them to enhance the rent of tenants without the consent of the co-parceners.

Balaji v. Gopal. ... 296

ESTOPPEL.

————by Acquiescence.

See Estoppel 1-4.



ESTOPPEL by Attestation of deed.

See Estoppel 1.

—by Conduct.

See Estoppel 1-4.

—by Decree.

See Res judicata and Estoppel 5.

—Party to agreement.

See Estoppel 6.

1.—*Concurrence—Attestation of deed*] Mere attestation of the deed of sale does not necessarily import concurrence in the alienation.
Babar Haribhai v. Nathu 398

2.—*By conduct—Mortgage by brother—Suit against mortgagor only.*—Where the defendants intentionally caused the plaintiff to believe that their brother fully represented the family in all matters connected with the mortgage of the family property, they were estopped from denying that the decree obtained by the plaintiff on that mortgage against that brother alone bound the whole property, or from availing themselves of the plea that as only such brother's share is mentioned in the certificate of sale, that share only was sold.

Udesing v. Kavaji. ...19

3.—*By conduct—Mortgage by brother.*]—The presumption of division arising from separate dealings by the members of a Hindu family is a strong one, and when in the course of those dealings a third party has been induced to enter into a transaction by the apparent assent of one brother to the separate ownership of another, and estoppel arises as against the one who has thus acquiesced either on account of his having no right or else with a view to further a fraud. Where, therefore, one of two undivided brothers wrote a mortgage of certain property which purported to be a mortgage by his brother alone, and made no mention of his share, and the mortgagee held possession under this separate transaction, it was held that the brother who had not joined in the mortgage and his representatives were estopped from setting up, as against the mortgagee, a right to redeem based on his continued union with his brother.

Ganesh v. Ramchandra, ...108

4.—*By conduct.*] A tenant in possession of land who consents to make over the land to an intending purchaser from his landlord and thereby induces the purchaser to pay the purchase money and complete the sale, is estopped from denying the purchaser's right to recover the land.

Bayaji v. Natha. ...310

5.—*By decree—Agreement by mortgagor to redeem and sell—Compromise of redemption suit—Suit by purchaser to redeem.*] A mortgagor, executed an instrument purporting to convey one half of the mortgaged property to the plaintiff, and agreeing to redeem the mortgaged estate and to deliver possession of a moiety to the latter, and in pursuance of such a provision instituted a redemption suit, which, however he compromised and the suit was dismissed under S. 98 of Act VIII of 1859. The plaintiff then brought a suit against the mortgagee alone to redeem. *Held* that the plaintiff was estopped by

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him as the plaintiff's agent and with his consent, the plaintiff not having shown that A. was not also his agent carrying them through.

Moro v. Ganesh. ...316

6.—*Estoppel—Party to agreement.*] A party to an agreement who accepted from the other side an annuity in consideration of the abandonment of his patelki and thereby taken the benefit of the same cannot be allowed to repudiate their liability under the agreement.

Dadaji v. Bhaskarrav. ...24

EVIDENCE.

———Admission.

See Evidence 7.

———Ancient documents.

See Evidence 1.

———in Appeal,

See Appeal 5-9.

———Certified copy.

See Evidence 2.

———Jangal Khardas.

See Evidence 3.

———Objection as to admissibility.

See Evidence 4.

———of Partition.

See Evidence 5.

See Hindu Law—Partition.

———Presumption of death.

See Evidence 6.

———Secondary.

See Evidence 7.

———of Subsequent conduct of Parties to contract.

See Execution of decrees 1.

1—*Ancient documents.*] Ancient documents by which a person proposes to make a title for himself, are of extremely slight value, except when connected with facts which corroborate them, established by independent evidence.

Dattatraya v. Anant. ... 304

2.—*Act, S. 76—Certified copy of public document, admissibility of*] Certified copies of public documents can only be admitted in evidence under s. 76 of the Evidence Act if they are subscribed with the official title of the officer by whom they purport to have been given.

Nizam Ali Khan v. Mahamadkhan ... 16

3.—*Jungle Kharda.*] A *jangal kharda* is a document prepared by the survey of village officers to the preparation of which the parties to the suit are not parties and therefore it is no evidence of title as between them.

Krishnarav v. Ganpatrav. ... 252

4.—*Objection as to admissibility of—Document can be proved by the writer.*] Bonds admitted in evidence without objection on the other side cannot be held to be inadmissible by the Appellate Court. They can be legally proved by the evidence of the writer if his evidence satisfy the Court.

Dayabhai v. Bai Amba ... 276



EVIDENCE.

5.—*Of partition—Unregistered partition deed—Secondary Evidence.*] Secondary evidence of the contents of an unregistered but compulsorily registrable deed of partition, cannot be received, but in order to establish the partition, and its nature, the parties would be left to such evidence of separate possession, payment of assessment, &c., as might be forthcoming and properly admissible.

Govindaya v. Kodsar. ... 342

6.—*Act I of 1872, Ss. 107, 108—Presumption of death.*] Sections 107 and 108 of the Indian Evidence Act have no application to a case where the question is not whether a particular person was dead at the time of the trial, but whether he was dead or presumably dead when an adoption took place before the Act came into force. The law then applicable would be the Hindu Law, and the shortest period which under that law raises a presumption of death is the period of 12 years from the date when the absent person was last heard of.

Ganesh v. Ragho. ... 107

7.—*Secondary—Unregistered deed—Admissions.*] S. 65, cl. b of the Evidence Act of 1872 does not apply to a case where the original document is before the Court, and the Court has an opportunity of perusing its contents but where the original is not before the Court and its contents have to be proved *aliunde*. The admission in writing referred to in clause b can only be admissible as evidence of the contents of the original when the original is not before the Court, or admissible as evidence of the existence of the original when the original is not produced or its existence denied. Secondary evidence, therefore, of a compulsorily registrable, but unregistered deed in the shape of admission thereof contained in other deeds is inadmissible to prove the contents of the unregistered deed.

Sakharambhat v. Rama... 236

EVIDENCE Act I of 1872, S. 76.

See Evidence 2.

—Ss. 107–08.

See Evidence 5.

EXECUTION of Decree.

—Adjustment out of Court.

See Execution of decree 1.

—Attachment, bailiff's duty.

See Execution of decree 2.

—Attachment before judgment, effect of.

See Execution of decree 3.

—Attachment of contingent claim.

See Execution of decree 4.

—Attachment, Exemption from.

See Execution of decree 5.

—Attachment of Pension.

See Execution of decree 5.

—Attachment of property of deceased.

See Execution of decree 6.

—Attachment of right to future maintenance.

See Execution of decree 7.



EXECUTION of decree.

——Continuing in possession—Mortgage after satisfaction of prior decree.

See Execution of decree 8.

——Damages, obstructor liable for.

See Execution of decree 15.

——Deceased defendants's representative.

See Execution of decree 9-11.

——Declaring plaintiff co-owner with defendant.

See Execution of decree 12.

——Duty of Court executing decree.

See Execution of decree 12-13.

——Of High Court.

See Limitation 11.

——Limitation.

See Limitation 9-11.

——Possession, delivery of.

See Execution of decree 14.

——for sale of mortgaged property by mortgagee, stay of.

See Execution of decree 13.

——Standing crops.

See Standing crops.

——Stay of.

See Execution of decree 13.

See Principal and surety.

See Sale in execution of decree 3.

See Stay of execution of decree.

——Step in aid of.

See Limitation 9-10.

1.—*Adjustment out of Court not certified—Act VIII of 1859, S. 206—Subsequent conduct of parties, evidence cf.*] The provisions of Section 206 of Act VIII of 1859 prevent a Court from taking cognizance of any adjustment of payment said to have been made out of court, unless the same were duly certified to the Court but where the conduct of a decree-holder rendered it perfectly clear that there must have been some adjustment out of Court then in justice to the parties it would be necessary to admit evidence of the nature of the adjustment in spite of the provisions of Sections 90 and 91 of the Evidence Act. Krishnarav v. Antaji ...347

2.—*Attachment—Bailiff's duty.*] A bailiff is not bound to attach property, merely because it is pointed out by the decree-holder if he sees good reason to believe that it does not belong to the judgment-debtor, but if there is no sufficient reason to doubt that it is the property of the debtor, he should attach it and leave the claimants to come forward and establish their right. Kussondas v. Vanmalee. ...262

3.—*Attachment before judgment—Civ. Pro. Code, S. 489.*] By S. 489 of the Code of Civil Procedure attachment before judgment does not bar any person holding a decree against the defendant from applying for the sale of the property under attachment, in execution of such decree. Nagindas v. Lalu. ...285



EXECUTION of decree.

4.—*Attachment of contingent or expectant claim.*] A claim on a third person contingent or expectant upon a judgment-debtor's making payment cannot be attached or sold in execution of a decree against him. *Ambu v. Ninuji.* ...353

5.—*Attachment of Pension—Civil Pro. Code. Act X of 1877 s. 266 g.*] Sec. 266 g of Act X of 1877 does not apply to a proceeding the object of which is to give effect to a decree for sale founded on a mortgage. *Motabhai v. Chandrashekhar.* ...40

6.—*Attachment of property of deceased debtor.*] If the movable property of a deceased judgment-debtor sought to be seized is in the possession of his heirs, the attachment should be made by actual seizure. *Tarbhovan v. Jiva.* ...228

7.—*Attachment and assignment of right to maintenance—sale in execution.*] A Hindu widow's right to maintenance out of family property is not assignable and therefore it does not make her the owner of the property or any part of it, so that her execution creditor by selling it as hers could transfer it to a stranger. *Gangabai v. Krishnaji.* ...100

8.—*Continuing possession in—Mortgage after satisfaction of prior decree.*] A mortgagee who has obtained a decree can obtain an order in execution that he shall be continued in possession of mortgaged property after the satisfaction of a prior decree in execution of which he may be already in possession. *Appajirav v. Tusedula.* ...255

9.—*Against defendant deceased.*] There must be some person on record as representative of a deceased defendant before execution can be had as against the estate which belonged to him at his decease. If the deceased left no relatives and made no valid disposition of his property, the crown would be his heir and under such circumstances his legal representative. *Abrahamji v. Nathwa.* ... 47

10.—*Against representative of deceased defendant—Burden of proof.*] The representative of a deceased for the purpose of any suit or execution is his representative in relation, and only in relation to some property or power over property which has devolved on him in that character. There can be no representative of a deceased where there is no estate of the deceased and when execution of a decree is sought against a person as representative of a deceased judgment-debtor who denies that any property has come to his hands, the burden rests on him who asserts the representative's responsibility to prove affirmatively all the facts requisite to constitute it. *Khushaldas v. Wamanrav.* ... 104

11.—*Deceased defendant—Representative.*] A decree can be executed against those persons only against whom the suit was directed, or their representatives. *Ramchandra v. Vinayak.* ... 108

12.—*Decree declaring plaintiff co-owner—Interest on mesne profits.*] A decree declaring the plaintiff a co-owner of a village with the defendant cannot be executed by partition by metes and bounds, but should be executed by giving notice to all persons concerned that the plaintiff holds an equal right with the defendant in the property and every part of it, and that all persons liable to account as tenant or otherwise to the owners are accountable equally to the plaintiff. *realpatidar.com*



EXECUTION of decree.

tiff as to the defendant. The Court executing a decree cannot give interest on mesne-profits not awarded by the decree.

Vithal v. Martand ... 65

13.—*Duty of Court executing decree—Altering or varying decree—Decree for sale of mortgaged property—Stay of sale.*] Where a decree empowers the mortgagee to sell the mortgaged property in default of payment by the mortgagor within a limited time the Court cannot make an order staying the sale on the mortgagor making a payment and giving security for the balance. Though the mortgagee may not have appealed against such order, it is still open to him to object to it, on an application by the mortgagor to set aside a sale which has been held in consequence of his alleged failure to comply with his order.

Mulchand v. Pandu. ... 320

14.—*Possession of property purchased at sale in—Intoxication.*] Delivery of possession of immovable property purchased at an execution sale cannot be made while the person in possession is in a state of unconsciousness from intoxication.

Vena v. Ahir ... 118

15.—*Obstructor liable for damages*] The defendant obstructed the plaintiff in the execution of a decree by the latter by representing that he was in possession of the property against which execution was sought. Held that the defendant made himself liable, in the event of his turning out to be a trespasser, to recoup the plaintiff for everything which he might have recovered from the property.

Gopaldas v. Shrinivas. ... 277

EXECUTOR de son tort—Account.] An executor of his own wrong is fairly entitled to recover from the estate any sums which he may have paid for the benefit of the estate, if such sums would have been paid by a properly constituted administrator in a due course of administration.

Gurlingappa v. Gurappa. ... 327

EXEMPTION from assessment.

See Assessment, exemption from.

EXEMPTION from attachment.

See Execution of decree 5.

EX-PARTE.

—*Application to rehear appeal decided—Civ. Pro. Code, S. 56.*] An application made under S. 560 of the Civ. Pro. Code to rehear an appeal decided *ex parte* cannot be summarily rejected, but must be considered on its merits.

Kodepa v. Balaji. ... 279

EXTRAORDINARY Jurisdiction.

See Costs 3, and Revision.

FAMILY custom.

See Custom.

FIRST hearing.

See Appeal 4.

FISCAL Act, construction of.

See Bombay Act III of 1878, S. 12.

FRAUDULENT conveyance.

See Mortgage 7.



FUTURE maintenance, attachment of.

See Execution of decrees 7.

GUARDIAN.

————Mortgage by.

See Alienation by guardian 2.

————Alienation by.

See Alienation by guardian.

————Appointment of.

See Act XX of 1864, S. 6.

HIGHWAY.

See Bombay Act IV of 1868, S. 11.

HINDU LAW—Adoption.

————Alienation by widow prior to.

See Hindu Law—Alienation by widow 2.

————Conditional—*Provision restricting and defining right of adopted son—Life estate to widow.*] On an adoption by a Hindu widow the deed of adoption stipulated that the boy on his adoption should be the proprietor of the widow's husband's estate and added that "he is by means of your (widow's) orders the proprietor of the afore-mentioned property, and provided that even after attaining majority the adopted son was to be obedient to his adoptive mother and grand-mother, failing which his maliki or ownership was to abate during their lives and that if he should seek to remove their maliki and keep it all to himself, he should in that case be reduced to an allowance—" so long as you are alive the proprietorship shall be yours." *Held* that the widow was not entitled to a life estate in her deceased husband's property under the deed. Radhabai v. Damodar. ...2

HINDU LAW—Alienation of ancestral property.

————By manager.

See Hindu Law—Ancestral property 1-2.

————Sale in execution of decree against father and Manager alone.

See Hindu Law—Alienation of ancestral property 3.

1.—*By manager as his sole property.*] Where the manager of an undivided Hindu family sells a part of the family property as his own sole property and not as exercising or professing to exercise his authority as manager, and the purchaser who takes it without taking the trouble to make enquiries from the other parceners, cannot afterwards rest on his vendor's authority as manager and cannot acquire more than his vendor's share. Vrijbhukhandas v. Kirparam. ...127

2.—*Mortgage by manager of undivided family.*] The authority of a manager of a joint Hindu family to alienate or charge the estate is a limited authority. A mortgage of the joint land by the manager to buy cattle would not be a sufficient reason in ordinary circumstances to justify the creation of a charge on the estate without the assent of the other co-parceners. Baji v. Dev. ...122

3.—*Sale in execution of decree against member alone of undivided family in respect of family debt.*] A sale in execution of a decree



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HINDU LAW—Alienation of ancestral property.

against one of the several Hindu brothers, the manager of the undivided family, in a suit in respect of a debt incurred in the course of the family business, but in which the defendant was not sued as manager and where only the right, title and interest of the defendant sued are sold, will not pass the interest of the other members of the family.

Bhimasha v. Krishnasha. ...84

HINDU LAW—Alienation by widow.

1.—*Of widow's estate—Maintenance.*] A Hindu widow may sell her widow's estate in her husband's property whether it be for the payment of her husband's debts or for her own maintenance or not and she may sell his property and make a complete title to it against his heirs, if it be necessary to do so for payment of his debts and to provide for her own maintenance. A Hindu widow is not entitled to maintenance from her husband's relatives who are not in possession of her husband's property or other property belonging to the family which is liable to her for her maintenance. Sukharam v. Jankibai. ...34

2.—*Before adoption.*] A mortgage executed by a widow would bind the adopted son if it were executed by her *bona fide* to secure a debt (neither illegal, nor immoral) of her husband and before the adoption, or to secure a debt incurred for such purposes as a widow may legitimately charge the estate of her husband.

Babaji v. Sata. ...351

HINDU LAW—Inheritance to females.—Son of step daughter of widow.] The son of daughter of the husband of a deceased widow by a co-wife is her heir although she survived her husband were her marriage has been in one of the approved forms.

Motiram v. Mayaram. ... 313

———*Joint property.* In the absence of any proof to the contrary, it must be presumed that the property acquired when the brothers were living together was so acquired by means of the family funds.

Nathu v. Mahadu. ... 251

———*Maintenance of widow,*

See Hind Law—Alienation by widow 1.

1.—*Right to, where no ancestral property.*] A Hindu widow is not entitled to maintenance from her husband's relatives where there is no family property and where the widow herself was taken any property which her husband left. Ganesh v. Yemunabai. ... 33

2.—*Money received from son-in-law by widow.]* The fact that a widow received money from her son-in-law in consideration of his marriage to her daughter will not affect her right to insist upon a continuance of the maintenance decreed to her.

Radhabai v. Ragho. ... 86

3.—*Execution of decree—Attachment and assignment of right to maintenance—Sale in execution.]* A Hindu widow's right to maintenance out of family property is not assignable and therefore it does not makes her the owner of the property or any part of it, so that her execution creditor by selling it as hers could transfer it to a stranger.

Gangabai v. Krishnaji. 100

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HINDU LAW PARTITION.

—Account.

See H. L.—Partition 1.

—Evidence of.

See H. L.—Partition 2.

—Finality of—Re-opening.

See H. L.—Partition 3-4.

—Onus probandi that property joint.

See H. L.—Partition 5.

—Re-opening.

See H. L. Partition 3-4.

1.—*Account—Contribution.*] Even where a partition is made, one co-parcener is not, as a rule, entitled to an account against another co-parcener in respect of payment made by the former: still less, while union continues, can one co-parcener claim contribution from another in respect of a single payment. Where the plaintiff, a member of an undivided Hindu family, had been for years harassing the defendant, his co-parcener, with such suits, the High Court in one such suit which was cognizable by a Small Cause Court, said that under the circumstances, it ought to exercise the power conferred by S. 622 of Act X of 1877, and hold the suit unsustainable.

Nanabhai v. Nathabhai. ... 325

2.—*Evidence of—Adverse possession.*] It is not uncommon for certain members of a Hindu family to hold or occupy particular portions of the ancestral property and certain other members to hold other portions although no partition of the estate has been made and the right to it continues. Exclusive occupation or enjoyment is evidence of partition but where, notwithstanding the existence of such occupation or enjoyment, there is an expressed agreement that the portion so occupied and enjoyed shall be regarded as undivided, that agreement rebuts any inference from a mere continuation of the same occupation and enjoyment which existed before and at the time of the agreement and something more is necessary to show that there is adverse possession.

Atmaram v. Madharav. ... 388

3.—*Finality of—Re-opening—Fraud—Charges on inheritance.*] Where it was found that the defendants, in a partition of the family property did not deal fairly with the plaintiff and did take undue advantage of him the partition deed was held null and void.

Damodardas v. Uttamram. ... 59

4.—*Finality of—Subsequent rise in value—lapsed share, right to inherit—Re-union.*] Where under the terms of a deed of partition between the brothers the shares of each are defined in particular parts of the family property but there is no actual division, the brothers are entitled to the shares as so defined notwithstanding subsequent change in value of the different parts. Where there is no re-union each brother is entitled to a share in the lapsed share of a deceased brother dying without issue. It is only in the event of a re-union amongst some of the former coparceners that they could acquire *inter se* rights of inheritance exclusive of those of the other members.

Amritrav v. Abaji. ... 87

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HINDU LAW—PARTITION.

5.—*Onus probandi that property joint.*] In a partition suit where it is proved that a partial partition has been established it is for plaintiff to prove that the banking concerns had not been divided : or in other words, that they continued to be joint.

Umias Shankar v. Bai Ratan. ... 56

HINDU LAW—Self acquired property—Pleader's gains.] Where three brothers, pleaders, carry on their profession, in three different places, there is some *prima facie* improbability that they have done so jointly, though they may have had undivided family property and a Court should not consider as conclusive a statement to that effect made to the Licence Tax commissioner by one of such brothers since deceased, especially where the rights of minors are concerned but should look for further evidence.

Bhagirthibai v. Sadashivrav. ... 314

HINDU LAW—Stridhan—Ornaments given by husband—Onus probandi.] If there has been an actual and complete gift without fraud the ornaments belong solely to the wife. If given only in the sense of being placed in her charge for use on extraordinary occasions they remain the property of the husband. Wearing the ornaments at festivals affords a ground of inference in favour of the husband's ownership. The inference is in no case conclusive. Possession being *prima facie* proof of ownership the *onus* of showing, when the wife has the ornaments, that the two do not go together, lies on him who affirms that proposition.

Kurnaram v. Hinibhay. ... 102

HINDU LAW—Undivided family.

1.—*Powers of Manager—Construction of eaves.*] The consent of the father and manager of an undivided Hindu family given for valuable consideration and for the common benefit of the family to the construction of eaves by the defendants' father binds the family.

Nabachand v. Magan ... 164

2.—*Sale in execution of decree against one Member—Suit by another member for share in the property sold.*] Where a portion of the undivided family property has been sold in execution of a decree against one of the two undivided brothers, the other brother cannot sue for his share thereof without suing for a general partition of the whole property, nor will, in such a suit, be awarded joint possession with the purchaser, where he has set up a false case of separation, while participating in the fruits of the loan on account of which the property has been sold and where his suit for a general partition is not time-barred.

Gopal v. Atmaram ... 233

HINDU LAW—Will—Unequal distribution of ancestral property]

A father has no testamentary power to make unequal divisions of the ancestral moveable estate amongst his sons.

Manakeband v. Nathu ... 52

HIND Widow.

—Alienation by.

See H. L. Alienation by widow

—Maintenance of, alienation by widow for.

See H. L. Alienation by widow 1.



HIND widow.

————Sale in execution of decree against.

See Sale in execution of decree 2.

HUSBAND and wife.

————Cruelty.

See Restitution of conjugal rights 1.

————Restitution of conjugal rights.

See Restitution of conjugal rights.

IMMOVABLE property.

See Alienation by guardian 1.

IMMOVABLE property, interest in.

See Registration 1.

————Standing crops.

See Standing crops.

INADEQUARY of price.

See Sale in execution of decree 5.

INFANT.

See Minor.

INHERITANCE to females.

See Hindu Law—Inheritance to females.

INJUNCTION.

————Act X of 1876, S. 11.] Where the plaintiffs had obtained a decree declaring that the Government had not the right to enhance the revenue on their village, and the Collector, pending an appeal from such decree, took measures to levy such enhanced assessment, it was held that though the plaintiffs might have obtained an injunction against the Collector by motion either in the Court which had passed the decree or in the High Court, that did not prevent the plaintiffs from bringing an independent suit for that purpose, and that S. 11 of Act X of 1876 did not apply. Even assuming that an application to set aside a Collector's order made to the Revenue Commissioner would be an appeal allowed by law within the meaning of that section, the present case was not within Bom. Reg. V of 1830, inasmuch as cl. 4, S. 1 of that Regulation would have excluded his intervention, as the claim to exemption from liability to enhancement of revenue had already been the subject of judicial investigation and was still *sub judice* in the High Court.

Government of Bombay v. Bhimbhai. ...198

INSTALMENTS, decree payable by.

See Procedure 7.

INTEREST in immovable property.

See Registration 1.

INTEREST and principal, separate suits for.

See Splitting cause of action 2.

INTEREST on mesne profits.

See Execution of decree 12.

ISSUE, Omission or refusal to decide.

See Procedure 5.



JANGAL, Khardas.

See Evidence 3.

JOINT lessors, enhancement of rent by.

See Enhancement of rent.

JOINT survey rules.

See Timber.

JURISDICTION.

———Acquiescence in.

See Jurisdiction 5.

———Boundary dispute.

See Boundary.

———Caste question.

See Jurisdiction 1.

———Cause of action arising within.

See Jurisdiction 2-3.

———Consent.

See Jurisdiction 5.

See Splitting cause of action.

———Court of requests.

See Jurisdiction 4.

———Objection not raised in Courts below as to.

See Jurisdiction 5.

———Partnership, account suit for.

See Jurisdiction 6.

———Pensions Act.

See Jurisdiction 7-8.

———Sirdar of Deccan.

See Jurisdiction 9.

———Village Munsiff.

See Jurisdiction 10.

1.—*Caste question*—*Bom. Reg. II of 1827 S. 21, cl. 1.*] It would be an interference in a caste question within the meaning S. 21, cl. 1 of Bom. Reg. II of 1827 if a Court were to make a decree ordering the members of a caste to re-admit a member to participation in caste communications and privileges. *Narotam v. Mithalal.* ... 64

2.—*Cause of action*] If the plaintiff's firm at Poona drew bills on the defendant's firm at Madras, and put the defendant in funds to meet those bills by purchasing and remitting to the defendants bills on bankers in Madras, of which the defendants received payments, and the defendants' firm never drew bills upon the plaintiff's firm, the cause of action would not arise in Poona. But if the plaintiff's firm, drew bills on the defendants and the defendants' firm drew bills on the plaintiff and the result of such transaction was a balance in favour of the plaintiff, the Poona Court would have jurisdiction. *Brijmohandas v. Sundardas.* ... 71

3.—*Cause of action arising within—consignment of goods for sale in Siam through defendants' firm in Bombay.*] Where the plaintiffs' firm in Ahmedabad sent goods to the defendants' firm in Siam through the defendants' branch firm in Bombay, and drew hundis in



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respect of such goods on the Bombay firm which were paid there to the plaintiffs' account. *Held*, that the cause of action in respect of monies due on account of a consignment of goods so made, arose in Bombay. The consignment to Siam was made from Bombay and not from Ahmedabad, inasmuch as the good would, for the purposes of such consignment, have been delivered to and accepted by the Bombay firm in Bombay, and the defendants' responsibility would thus begin in Bombay. And if the payments of the sale proceeds were ordinarily made as above described, the cause of action (if any) would arise in Bombay as in that case, the usual course of business would lead to the inference that the agreement between the parties was that the defendants should pay the proceeds of the goods sold in Siam over to the plaintiffs in Bombay.

Remtulla v. Panabhai. ... 332

4.—*Military Court—Act XI of 1841 Ss. 2, 17—Appeal.*] In order to give a Military Court jurisdiction in a case where the claim is under Rs. 200 the defendant must not only carry on business in a military bazar, but must also reside within the station. And where the claim exceeds that amount, he must be a person amenable to the articles of war. Under S. 17 of Act XI of 1841 the High Court has jurisdiction to entertain an appeal from a decision of a Military Court at Disa.

Amarchand v. Ladha. ... 307

5.—*Bom. Act III of 1876—Mamlatdar's order—retrial—Acquiescence.*] The Collector has no authority to set aside an order made by a Mamlatdar under Act III of 1876 and direct a retrial before another Mamlatdar. An order passed on such retrial is without jurisdiction. The fact that the person against whom such an order is passed appeared, when summoned, before the second Mamlatdar, is not an acquiescence in the propriety of the proceedings, nor would such an acquiescence of itself, give the Mamlatdar a jurisdiction which he did not possess to sit in appeal on the judgment of his predecessor.

Ravlojirav v. Satu, ... 100

6.—*Partnership, suit for—S. 265 of Act IX of 1872—Parties.*] A suit by one partner, after the termination of a partnership, to recover his share of the assests, must, under S. 265 of the Contract Act IX of 1872, be brought in the district Court, and all the partners must be made parties.

Bhowsar v. Bhowsar. ... 393

7.—*Pensions Act XXIII of 1871.*] The Pensions Act XXIII of 1871 does not apply to a suit between co-sharers of an Inam where there has been an adjudication by the Inam Commissioner under Act XI of 1852, Sch. B., Rule 2, on a claim, based on Sanads, to hold the land as exempt from liability to revenue recognizing such claim.

Barati Begam v. Shekh Karimudin. ... 93

8.—*Pensions Act XXIII of 1871.*] Where a Judge raises an issue at a late stage of the case as to the necessity of producing a certificate under the Pensions Act XXIII of 1871, he ought not to refuse plaintiff permission to produce evidence which would show that no such certificate was necessary.

Vyankatray v. Ranchandra. ... 105



JURISDICTION.

9.—*Sirdar of the Deccan—Subordinate Judge with powers of Small Cause Court.*] A First Class Subordinate Judge invested under Act XIV of 1869 with the jurisdiction of a Judge of a Court of Small Causes, is not a Court of Small Causes constituted under Act XI of 1865, and cannot entertain a suit against a First Class Sirdar of the Deccan. *Rajaram v. Yeshwant.* ... 323

10.—*Village Munsiff—Rent suit.*] A village Munsiff has no jurisdiction to entertain a suit for rent. *Ravji v. Lal Husanbhai.* ... 386

KABULYATDAR khote.

See Enhancement of rent 2.

KHOTE *liability of, to pay khoti faida*] One of the sharers in a *khoti* village frequently cultivates land in the village on his own account, and in respect of such land he may or may not be liable to pay *khoti faida* to the whole body of shares including himself. If he were to buy a piece of *dhara* land from a *dharakari*, he would not be liable to such payment any more than the *dhardhari* himself. If, on the other hand, he were to take up a piece of waste *khoti nishut* land, he would be liable in the absence of a special agreement to the contrary with the other sharers. *Ramchandra v. Visaji.* ... 383

KHOTI lands.

See Landlord and tenant 1.

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—*Landlord and tenant—Khote lands—Bom. Act I of 1865, Ss. 34 and 38.*] In 1865 the defendant became tenant of certain *Khote* lands for one year. The management of the village was assumed in 1866 by the Collector which continued till 1872 and during this time the defendant held on the same terms of payment as the other ryots of the village. On a right construction of S. 34 of the Survey Act I of 1865, *held* that the defendant could not thus acquire any rights as against the *Khotes* on their restoration other than those, if any, arising from his mere occupation for six years. No right could thus be created in the defendant's favour which would prevent the *Khote*, who was owner and entitled to possession in 1866 from being equally owner and entitled to possession in 1872, provided the defendant was allowed to work out his current year of cultivation and remove the crop he had sown by license of the then manager of the estate. An order of the Settlement Officer under s. 38 of the Survey Act to fix the demand of the *Khote* on the tenant, could not bind the ryots to the land against their will, and could not reduce them from the position of free tenants to *ad scripti gleba*. Having accepted the position of a mere temporary contractual tenant instead of a guaranteed tenant under the Act, the defendant was bound to surrender the land to its owner.

Narayan v. Balu. ...124

2.—*Notice to quit—Yearly tenant—Talukdari village—Bom. Act I of 1865, S. 49.*] A yearly tenant is entitled to six months' notice



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to quit independently of Bombay Act I of 1865, s. 49, which does not apply to alienated villages unless specially extended to them.

Amarsang v. Bai Man. ... 341

LAND TENURE—*Suti land—Ejectment—Onus probandi.*] A person holding lands as *sutidar* is not liable to enhancement of land assessment nor to ejectment so long as he pays such assessment as is warranted by the custom of the country. The burden of proving that his tenure is that of a *sutidar* and not that of a mere tenant at will lies on the person who asserts it. The term '*suti*' is equivalent to the term '*mirasi*' in the Deccan.

Waman v. Vinayak ... 217

LEASE, stamp on.

See Stamp 2-3.

LETTERS of Administration.

See Certificate of administration.

LIABILITY of friend negotiating for a loan.] Where a person acted only in the capacity of a friend introducing the one who had money to lend to the other who wanted money for the purpose of his business and negotiating the loan by one to the other, he is not liable for the loan either as a principal or a security for the debtor.

Waman v. Vishvanath. ... 241

LIMITATION.

See Adverse possession.

See Limitation 1-4.

—Attached property, suit to establish title to.

See Limitation 5.

—Deduction of time occupied in former proceedings.

See Limitation 6.

—Easement.

See Limitation 4, 7.

—Eaves, suit to remove.

See Limitation 8.

—Execution of decree.

See Limitation 9-11.

—Mamalatdar's order for possession.

See Limitation 12.

—Promissary note on demand.

See Limitation 13.

1.—*Adverse possession—Heirs of Mahomedans.*] When the several heirs of a Mahomedan entitled to separate shares reside together and do not actually divide, it cannot be said that any one is acquiring a title by limitation or prescription against the others. The possession of each of the joint owners is the possession of all who assent to it until some one of them is distinctly excluded.

Imamsaheb v. Sayad. ... 158

2.—*Adverse possession—Perpetual lease by tenant for life.*] Where on a partition between brothers, a piece of land is assigned to their mother for life as a means of subsistence, adverse possession



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under a perpetual lease granted by her and some of her sons of the land so assigned will not commence as against the brothers who have not acquiesced in the lease until the mother's death.

Nilkanth v. Shivram. ... 67

3.—*Adverse possession—Mamlatdar's order for possession.*] Where the defendant, who was alleged by the plaintiff to be in possession of certain lands as his servant, was ejected by the plaintiff, and sought the aid of the Mamlatdar Court denying the plaintiff's proprietorship altogether, and was restored to "possession as before":—*held* that from the moment of his restoration he was in possession in absolute contradiction to plaintiff's right, and in no other character than that of owner as against the plaintiff. No relation of trust or landlord and tenant could subsist between them as against the will of both parties. The plaintiff's suit, therefore, to recover possession not having been brought before 1870, was barred by art. 7 of s. 1 of Act XIV of 1859.

Ramechandra v. Gunwantrav. ... 45

4.—*Adverse possession—Water-course—Easement—Prescription.*] The defendant constructed and used a water-course upon and through the plaintiff's land more than 12 years before the institution of the present suit to recover possession by the plaintiff. The defendant having been obstructed in his use of the water course obtained a decree in the possessory suit in the Mamlatdar's Court under Bom. Act V. of 1864 confirming him to possession. *Held* that the plaintiff being out of possession for more than 12 years his remedy was barred, and his title extinguished in favour of the defendant under S. 29 of the Limitation Act IX of 1871.

Chiman v. Bhagvan. ... 162

5.—*Property sold in execution, suit to recover.*] A suit to recover property sold in execution of a decree and which treats the sale as a nullity need not be brought within one year from the time of the sale.

Maharana Shri Gagubha v. Bhavanidas. ... 11

6.—*Deduction of time occupied in applying for review—Appeal—Act XV of 1877, S. 4.*] As a rule, when proceedings have been *bona fide* taken for obtaining a review of Judgment, the time so occupied, ought to be excluded from computation in reckoning the period of limitation allowed for an appeal. But if the application for review is presented on the last day allowed for appeal and if the appeal is not presented until seven days after the rejection of the review application no such allowance could be made and the appeal should be rejected as time barred.

Trimbakraj v. General Traffic Manager of the G. I. P. Ry. Co. ... 404

7.—*Well—Easement—Adverse possession.*] Where the plaintiff and defendant held adjoining survey numbers and there was a well on the defendant's number which the plaintiff alleged belonged to both the fields and which he had a right to sue for watering his field. *Held* that an admission by the plaintiff that he had not used the well for 15 years was a bar to his claim whether it was regarded as a claim to proprietary right or to an easement.

Krishnarav v. Ganpatrav. ... 25



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8.—*Suit to remove eaves.*] A suit for the removal of beams constructed by the defendant in such a manner as to overhang the plaintiff's land must be regarded as a suit for possession of immovable property to which the period of limitation applicable is 12 years, the act complained of being a dispossession of the plaintiff from immovable property on the principle that the whole column of space superincumbent on the plaintiffs' land belongs to him.

Appeal No. 372 of 1878. ... 113

9.—*Execution of decree—Act X of 1877 S. 230—Act XV of 1877 Art 179.*] Article 179 of Act XV of 1877 does not apply if the case is provided for by Section 230 of the Code of Civil Procedure. But that section merely provides that a subsequent application shall not be granted, if made 12 years after the date of decree, i. e., after 12 years execution is absolutely barred. The section does not say that any subsequent application shall be granted if made within 12 years. If the question of absolute bar does not arise, then the ordinary limitation period under Article 179 is applicable.

Mayaram v. Lalbhai. ...253

10.—*Act XV of 1877, art. 179—S. 230 of Civil Procedure Code—payment of bhatta.*] Payment of bhatta is not an "applying for execution, or to take some step in aid of execution." Article 179 of Act XV of 1877 does not apply if the case is provided for by Section 230 of the Code of Civil Procedure. But that section merely provides that a subsequent application shall not be granted, if made 12 years after the date of decree, i. e., after 12 years execution is absolutely barred. The section does not say that any subsequent application shall be granted if made within 12 years. If the question of absolute bar does not arise, then the ordinary limitation period under Article 179 is applicable.

Laldas v. Bhagwanji. ... 254

11.—*Act XV of 1877, Sch. II, Art. 180—Execution of decree of High Court—Reviver—Act X of 1877, S. 230.*] A decree of the High Court, dated 22 February, was sent to the District Court at Ahmedabad for execution. On the 4th February 1879, an order was made in the High Court by a Judge in chambers on a summons to the judgment-debtor, to show cause why execution should not issue, ordering execution to be had. On the 30th July 1879, an application for execution made to the Ahmedabad Court was rejected for informality. A fresh amended application was presented on the 26th August 1879. Held that the order of the Judge in chambers of the 4th February 1879, revived the decree, and that the judgment-creditor had under art. 180 of Sch. II of Act XV. 1877, 12 years from that date in which to execute the decree, unless that period had been shortened by the amended or unamended S. 230 of Act X of 1877 (Civil Procedure Code). Held also, that the period had not been so shortened under either section. The application of 30th July 1879 had not been granted, but was refused. Both sections saved from their operations proceedings taken to enforce decree within 3 years from the passing of the Code, unless the decree should have become time-barred within the 3 years by the law in force immediately before the passing of the



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Code. And by the terms of the unamended S. 230, the order granting the present application for execution was conclusive evidence that due diligence was used to procure complete satisfaction under the last preceding application. *Sheth Mayabhai v. Motilal.* ... 287

12.—Act XIV of 1859, S. I Cl. 7 S. 24—*Mamlatdar's order for possession under Act XVI of 1838 in Satara—Suit for possession.*] The sense in which the Regulations were introduced in the Satara State by the proclamation of 1848 was to be gathered from the practice sanctioned or suffered to prevail, and by reference to this, it is certain that the Government chose to recognize, and by recognition, to constitute the Mamlatdar's Courts as revenue Court for the purposes of Act XVI of 1838. After the 1st January when the Bombay Regulations were introduced into Satara, any question as to the authority of a Mamlatdar and as to the limitation applicable to suit by which it was sought to supersede orders made by him subsequently to that date would be governed by the same consideration as in the other Regulation districts. This however did not in any way deprive of their effect any legal relations duly constituted before 1863. The limitation Act of 1859 had in view not the nature of the authority by which Act XVI of 1838 came into operation, but the nature of the order passed under it, which, after the prescribed lapse of time was to serve as a bar to further proceedings. Where therefore, an order for possession had been passed before 1863 by an officer vested with authority in that behalf by Government the party put out of possession was by S. 1, cl. 7 and S. 24 of Act XIV of 1859, allowed only 2 years after 1st January 1863 within which to bring the suit for possession.

Ramchandra v. Gunvantrav. ... 72

13.—*Promissary note on demand.*] The limitation period for a suit on a promissary note on demand is shorter under Act XV of 1877 than under Act IX of 1871 inasmuch as the period of 3 years begins now to run from the date of the instrument instead of from the date of the demand.

Sukur v. Kasam. ... 255

LIMITATION Act XIV of 1859.

—S. I, cl. 7 and S. 24.

See Limitation 12.

LIMITATION Act IX of 1871.

—S. 29.

See Limitation 4.

LIMITATION Act XV of 1877.

—S. 4.

See Limitation 6.

—Sch. II, art. 180.

See Limitation 9–10.

—Sch. II. Art. 180.

See Limitation 11.

LOSS or destruction of mortgaged property.

See Mortgage 5.

MAINTENANCE, Assignment of right of or attachment of right to,

See Execution of decree 7.



MAINTENANCE of Hindu widow.

——— Alienation by widow for.

See H. L.—Alienation by widow 1.

——— Right to.

See Registration 2.

MAINTENANCE, suit for.

See Small Cause Court—Moffusil 4.

MAMALATDAR'S order, Collector cannot set aside,

See Jurisdiction 5.

——— order for possession, effect of,

See Limitation 12.

MANAGER, power of, to sue tenants.

See Alienation by guardian 2.

——— of temple, suit by.

See Procedure 6.

MAXIMS—*Nemo debet esse Judex in Propria causa.*

See Sale in execution of decree 1.

MERGER.

See Mortgage 6-7.

MINOR.

——— Administration of estate of.

See Certificate of administration.

——— Education of minor.

See Act XX of 1864, S. 26.

——— Guardian *ad litem*, power of.

See Alienation by guardian.

——— Guardian, alienation by.

See Alienation by guardian 2.

——— Guardian, appointment of.

See Act XX of 1864, S. 6.

——— Suit by or on behalf of.

See Certificate of administration 2.

MIRAS

——— *Evidence of Miras holding.*] There is no authority for the proposition that without a *miraspatra* or similar document giving perpetual occupation there can be no *miras* right. The *mirasdar* in ninety-nine cases out of a hundred holds no grant or written muniment of his title. It rests on possession and enjoyment under a customary law.

Andu Bali v. Ramray. ... 156

MISJOINDER of parties.

See Parties to suit 2-5

MORTGAGE.

——— Accounts.

See Mortgage 12-13.

——— Attornment by mortgagor.

See Mortgage 11.

——— Covenant to repair.

See Mortgage 2.



MORTGAGE.

—Equity of redemption.

See Mortgage 3.

—Loss or destruction of mortgaged property.

See Mortgage 5.

—Merger.

See Mortgage 6-7.

—Notice.

See Mortgage 8.

—Payment of Government assessment.

See Mortgage 4.

—Possession.

See Mortgage 9-11.

—Priority.

See Mortgage 10, 11, 15, 16.

—Puisne mortgagee's right to redeem.

See Mortgage 12, 13.

—Redemption by co-mortgagor.

See Mortgage 14.

See Procedure 3.

—Redemption, parties to suit for.

See Mortgage 15.

—Redemption without notice of sub-mortgage.

See Mortgage 1, 17.

—Sale or.

See Execution of decree 1.

—Sale in execution of decree on.

See Mortgage 15, 16.

—Sub-mortgage with notice of redemption suit.

See Mortgage 18.

—Sub-mortgage, redemption without notice of.

See Mortgage 1, 17.

—Of vriti.

See Mortgage 19.

1.—*Sub-mortgage, Redemption without notice of.*] The redemption of a mortgage by the mortgagor without notice, i. e., without knowledge of the existence of a sub-mortgage is good against sub-mortgagee. Possession by the submortgagee of a part of the mortgaged property ought, however, to have put the mortgagor on inquiry as to the submortgagee's title. Narayan v. Maruti. ...48

2. *Covenant to repair—Damages.*] A mortgrgor is liable in damages for the breach of a general covenant to repair the mortgaged premises contained in the mortgage deed for the protection of the mortgagee's security. Sha Shival v. Sha Ramdas. ...356

3.—*Mortgage—Equity of redemption.*] A plaintiff who is the owner of an equity of redemption only cannot recover any part of the property without first paying the amount due on the mortgage.

Lalchand v. Tukaram.24

4.—*Payment of Government assessment by mortgagee, lien for—*
Mortgagor bound to pay before redemption.] A mortgagee who has



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paid the Government assessment on the mortgaged property has a lien for the amount on that property and is not bound to give up possession until that lien has been satisfied, because it is in the nature of a salvage claim. Shaik Idrus v. Vithal. ...207

5.—*Loss of Mortgaged property.*] Where the security has been lost through the breach of a contract on the part of the plaintiff (mortgagee) to pay assessment, he is not entitled to proceed against the mortgagor to recover the mortgage money.

Jamnadas v. Bai Muli. ...232

6.—*Merger.*] A first mortgage is not extinguished by a second mortgage of the same property to the same mortgagee, Goluknath v. Lallu Prem Lall (3 Calc 307) generally concurred in.

Venkatrao v. Gundo. ... 261

7.—*Merger—Colorable Sale to defeat creditors—Costs—Alternative case—Change of form of suit.*] A bona fide mortgage does not become merged in a deed of sale by the mortgagor to the mortgagee which is found to be a colorable sale for the purposes of defeating execution creditors. Where a mortgagee on the strength of such a deed of sale, sued to recover possession from a purchaser of the mortgaged property at an execution sale with notice of the mortgage, but set forth in his plaint his title as mortgagee, he was allowed to rely on his mortgage and recover possession though the sale deed was found to be colorable.

Choturam v. Dama. ... 345

8.—*Notice—Razinama—limited interest of mortgagor.*] A mortgagee with notice that the mortgagor, to whom a third person has executed a *razinama* resigning the mortgaged land absolute on its face, but accompanied by an agreement that it should only operate as a security for any debts of the former holder as the mortgagor should pay, has, under such agreement, only a limited interest; or who has notice of such circumstances as ought to have put him on inquiry *v. g.* that the person executing the *razinama* has continued in possession, will only acquire the mortgagor's limited interest.

Ambu v. Nimji. ... 353

9.—*Without Possession.—Purchaser at execution sale.*] A mortgage under unregistered document and without possession will not avail against a purchaser at an execution sale whose title has been perfected by transfer of possession.

Narsu v. Raghunath. ... 263

10.—*Possession—Priority.*] Where a mortgagee enters into immediate possession he will have precedence over another mortgagee who enters into possession subsequent to the former although the latter mortgage be prior in point of date.

Naro v. Balaji. ... 386

11.—*Possession—Notice—Prior unregistered mortgage without possession—Attornment by mortgagor.*] A mortgagee with possession and without notice of a prior optionally registrable and unregistered mortgage without possession has a good title as against the latter and a purchaser at a sale in execution of a decree obtained by him on his mortgage in a suit to which the mortgagee was not a



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party. Where the mortgagors attorn to the mortgagee as tenants and take the land from him for a term of years on lease, their possession is his possession.

Anant v. Arjun. ... 381

12.—*Puisne mortgagee's right to redeem after foreclosure decree—Accounts.*] The purchaser of an equity of redemption, or a subsequent incumbrancer, has a right to redeem a prior mortgage even after a foreclosure decree obtained by the latter in a suit to which the mortgagor alone has been made a party, owing to the prior mortgagee having had no notice of the sale of the equity of redemption or subsequent mortgage; but the purchaser or puisne mortgagee may be bound by the decree obtained in such suit as to the accounts.

Ganesh v. Balkrishna. ... 114

13.—*Puisne mortgagee's right to redeem after fore-closure decree—Accounts.*] At the date of the suit brought by the plaintiff against his mortgagor the equity of redemption had been mortgaged to A. by a registered deed. The plaintiff had thus notice of A.'s incumbrance and was bound to make him a party to his suit. *Held*, that A. was entitled to have an opportunity of exercising the option of redeeming the plaintiff's mortgage, but he is bound by the accounts taken between the plaintiff and his mortgagor.

Shivlal v. Jechand... 230

14.—*Redemption by some of several co-mortgagors.*] Any one or several tenants in common who have jointly mortgaged property is entitled to redeem the whole, and to receive the rents and profits until the amount due by the other co-mortgagor as their contribution towards the redemption money has been paid off. Then and not till then can the mortgagee enforce any subsequent mortgage of their shares executed by the other co-parceners.

Ganesh v. Raghunath ... 384

15.—*Sale in execution of a decree obtained by prior mortgage against mortgagor alone after prior sale in execution of a decree obtained by puisne mortgage—Parties to suit.*] A sale in execution of a decree obtained on a mortgage by a prior mortgagee against the mortgagor alone, after the mortgagor's right, title and interest have been sold in execution of a decree obtained by a puisne mortgagee and purchased by him, passes no title to the purchaser.

Pandubhat v. Balaji. ...21

16.—*Sale in execution of a decree on—Priority—Registered mortgage—Prior sale in execution of money decree against mortgagor.*] A purchaser of property in execution of a decree on a registered mortgage has a lien and title thereto prior to that of a purchaser of the same property in execution of a money decree obtained after the date of the mortgage.

Ramchandra v. Malhari. ...37

17.—*Sub-mortgage, Redemption without notice of.*] The redemption of a mortgage by the mortgagor without notice, i. e., without knowledge of the existence of a sub-mortgage is good against a sub-mortgagee. Possession by the submortgagee of a part of the mortgaged property ought, however, to have put the mortgagor on inquiry as to the sub-mortgagee's title.

Narayan v. Maruti. ...48

18.—*Sub-mortgagee with notice of redemption suit—Lien on money paid under redemption decree.*] A submortgagee who ad-



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vances money to mortgagees pending, and with knowledge of, a redemption suit, on the security of the property mortgaged, and whose mortgage deed contains no provision for a lien on the money to be paid under the decree in the redemption suit, and who has not by introducing himself to be made a party in the redemption suit, or otherwise, obtained an order creating a lien on such money is not entitled to a lien thereon in preference to the judgment-creditors of his mortgagors who have attached the money paid into Court under the redemption decree. *Mojiram c. Vithal.* ...161

19.—*Of vriti in gahan lahan form—Sale of the Mortgaged property to third person.*] A mortgaged his vriti to B in gahan lahan form. The mortgage money was not paid off within the time stipulated, and the mortgagee did not treat the mortgage as irredeemable. Held that the sale of the Vriti by A to a third person was binding and valid. *Rambhat v. Ramchandra.* ...215

NEMO debet esse judex in propria causa.

See Sale in execution of decree 1.

NEW case in appeal.

See Amendment of plaint.

NON-resident plaintiff.

See Procedure 8-9.

NOTICE, constructive.

See Mortgage 8, 17.

NOTICE to quit, absence of, objection not raised in Courts below.

See Practice 3.

NOTICE to quit, tenant from year to year.

See Landlord and tenant 2.

NUISANCE, abatement of.

See Right to sue 1-2.

OBJECTION not raised in Courts below.

See Procedure 3.

———Enhancement of rent by one of joint lessors.

See Enhancement of rent 1.

———Misjoinder of parties.

See Parties to suit 3-4.

———Notice to quit, want of.

See Practice 3.

———Validity of sale by mother and guardian *de facto* of Mahomedan infant.

See Alienation by guardian 3.

———Partition suit.

See Hindu Law—Partition 5.

———Self acquisition.

See Hindu Law—Self-acquired property.

ORDER, appeal from.

See Appeal 3-4.



PARTIES to suit.

—————For partition.

See Parties to suit 1.

—————For rent.

See Parties to suit 2-5.

1.—*For partition.*] In a suit regulating the rights of co-parceners amongst themselves who claim with and not through each other, one brother cannot be regarded as representing another.

Gopal v. Narayan. ... 5

2.—*For rent.*] The plaintiff sued D. for use and occupation of lands of which the plaintiff was mortgagee in possession. At D.'s request, V., whose tenant he alleged himself to be, was made a party to the suit, and V. alleged that the plaintiff's mortgage had been paid off by him, and possession given to him. Held that it was erroneous to dismiss the suit as being one, though nominally for rent, yet really to decide a dispute between rival mortgagees and thus a fraud on the revenue. V. had been made a party not at the request of the plaintiff, but at the request of D., and therefore the plaintiff was entitled to have the question of his right to recover the rent determined.

Bapu v. Vyankatray. ... 224

3.—*Objection not taken in Courts below.*] Where a plaintiff does not object in the Courts below to a third person being made a party, he will not be allowed to do so in second appeal.

Vishnoo v. Ramkrishnarav. ... 265

4.—*Objection as to—Title of Person claiming adversely, decision as to.*] Where no objection is taken to the introduction of a third person into the suit and the parties went on trial, the lower Court ought to have determined the question of title as between the plaintiff and the person so introduced as a party.

Satapa v. Raghapa. ... 336

5.—*For rent—Adverse possession*] Where in a suit for rent, it appears that the defendant has not entered under a lease from the plaintiff, but under one executed by a deceased person, whose heir a third person claims to be and as such to have received and to be entitled to receive the rents, such third person is a proper and necessary party to the suit ; and if it should appear that he has had adverse possession as against plaintiff for 12 years before he was made a party the plaintiff will be precluded from proving his title as against him, and consequently cannot recover a decree against the tenants, although his action as against them may not have been barred by time.

Bai Ganga v. Jagjivandas ... 331

PARTITION.

See Hindu Law—Partition 4.

PARTIES TO SUIT for partition.

See Parties to suit 1.

—————Of vatan.

See Vatan 2.

—————Partition] Deed Unregistered, secondary evidence.

See Evidence 5,



PARTITION suit, Account in.

See Hindu Law—Partition 1.

———**COSTS** of.

See Costs 1-2.

PARTNERSHIP, suit for.

See Jurisdiction 6.

———Purchase of partner's share in partnership property, effect of.

See Partnership 1.

———Suit by partner against co-partner.

See Partnership 2.

1.—*Purchase of partner's share in partnership property.*] A purchaser of a partner's right in certain partnership property is not liable for the debts of the firm, nor does he become substituted for his vendor as a partner. *Haribhai v. Dhanjisha.* ...123

2.—*Suit by partner against co-partners.*] One of several partners of a limited partnership cannot, on quarrelling with his co-partners, claim that the latter shall forthwith refund to him all moneys which he has put into the business. *Balvantrav v. Narayan.* ... 58

PAUPER suit, Application for leave to file.

See Practice 4.

PENALTY.

See Stamp 4.

PENSION, attachment of.

See Execution of decree 5.

PENSIONS Act XXIII of 1871.

See Jurisdiction 7-8.

PERPETUAL lease by tenant for life.

See Limitation 2.

PLAINT, amendment of.

See Amendment of plaint.

PLAINT, rejection of.

See Appeal 4.

See Procedure 10.

———Return of.

See Procedure 13.

PLEADER, appointment of, delegation of power of.

See Practice 5.

POSSESSION, delivery of.

See Execution of decree 14.

———Mortgage without.

See Mortgage, 9-11.

PRACTICE.

See Procedure.

———Alternative case.

See Practice 1.

———Amendment of plaint.

See Amendment of plaint.

———Objection not raised in Courts below.

See Practice 3.



PRACTICE.

———Pauper application for leave to sue as.

See Practice 4.

———Pleader, appointment of.

See Practice 5.

———Application to summon witnesses late.

See Practice 2.

1.—*Alternative case.*] Having regard to the statement in the plaint and to the issues framed the plaintiff is entitled to be regarded as having made an alternative case from the first, and as having claimed to fall back on his mortgage in the event of his claim as purchaser being disallowed : Held that the plaintiff should be allowed to rely upon his mortgage, though he has failed to prove his purchase.

Murharji v. Nanchand. ... 305

2.—*Application to summon witnesses late.*] An application by the defendants made on 4th July to summon witnesses who were not to be examined before the plaintiff's case was closed which happened on 16th July could not well have been made sooner because it would have been unreasonable to summon them until there was a prospect of their evidence being taken without any great delay.

Venkatesh v. Ganpaya. ... 62

3.—*Objection not raised in Courts below—Enhanced assessment, liability for.*] Where a defendant in a suit by a *Mulvanadar* to recover enhanced rent, has put in a written statement which has been construed by the Lower Courts as admitting his liability and only questioning the amount of enhancement to which he was liable and has allowed the case to go to trial on the single issue as to that amount he will not be allowed on second appeal, to turn round and say that the proper issue would have been whether he was liable at all.

Nagapa v. Shivram ... 321

4.—*Procedure—Pauper suit, application for leave to file—Limitation.*] Where, on the face of an application for leave to sue, as a pauper and on the plaintiff's own allegation, he has a right to sue the application cannot be rejected on the ground that from certain evidence produced it appeared that the suit was time-barred.

Anaji v. Tatyia ... 337

5.—*Pleader, appointment of, delegation of power of.*] There is nothing in the Civil Procedure Code, Act X of 1877, to interfere with the general rule of law that a man may appoint his own solicitor or pleader, or may delegate to another person the right to do so, and it is not reasonable that the delegate may not exercise the special power to appoint a solicitor or pleader, because he has not a general power of attorney.

Rav Raje Sir Dinkarav v. Kashinath. ... 400

PREScription.

See Easement.

See Limitation 4.

See Timber 1.

PRESUMPTION of death.

See Evidence 6.



PRINCIPAL and Surety.

1.—*Act XVIII. of 1838. s. 5—Guarantee for good conduct.*] The effect of s. 5 of Act XVIII of 1838 which provides “that the liability of the surety or sureties shall not be affected by the death of a principal or by his appointment to a situation different from that which he held when the bond was executed” is to preserve after the principal has been appointed to a new office, the liability of the surety in respect of defalcations of the principal which occurred when he was in the previous office, his good conduct in which the surety has guaranteed, and not to make him liable in respect of the principal’s defalcations in any new office to which he may be appointed. A surety for an acting Talati is, therefore, not liable for defalcations made by him after he has been confirmed in the office of the Talati.

The Mamalatdar of Alibag *v.* Ravji. ... 8

2.—*Discharge of surety—Stay of execution pending appeal.*] A person who becomes surety for a judgment-debtor in consideration of a stay of execution pending an appeal by the latter, is relieved from liability on the judgment-creditor obtaining a discharge of the order for stay of execution.

Karani Ahmedula *v.* Gaupaya ... 359

PRIORITY.

—Mortgage.

See Mortgage 10-11.

—Registered and unregistered documents.

See Registration 2.

PRIVY, demolition of.

See Bom. Act VI of 1873, S. 39, cl. 1.

PROCEDURE.

See Practice.

—Civil Procedure Code, S. 5.

See Procedure 1.

—Alternative case or Amendment of plaint.

See Procedure 2-5, 14.

—Counter claim.

See Procedure 5.

—Decree payable by instalments.

See Procedure 7.

—Dismissal of suit for default.

See Procedure 6.

—Minor, suit by.

See Certificate of administration 2.

—Non-resident plaintiff, appearance by agent.

See Procedure 8-9.

—Reference to High Court.

See Procedure 10-13.

—Transfer of suit.

See Procedure 15.

—Witnesses, refusal to examine.

See Procedure 16.

1.—*Civ. Pro. Code, Act X of 1877, S. 5.*] The reservations in S. 5 of Act X of 1877 under which some only of the subsequent sec-



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tions of the Code are applicable to the procedure of Small Cause Courts are limited by the section itself to the Courts constituted under Act XI of 1865, and have no application to other Courts even though these in any particular case may be exercising jurisdiction akin to that of the Small Cause Courts so constituted.

Multanchand v. Joseph. ...104

2.—*Alternative case.*] Where a plaintiff in a suit to recover rent rests his claim solely on a lease which is not proved he cannot be allowed to fall back on his general title. Krishnaji v. Kamla. ...231

3.—*Amendment of plaint—Change in the nature of claim—Mortgage, suit to redeem—Failure to prove mortgage—Another mortgage set up in defence—Objection not raised in Courts below.*] The plaintiff sued as assignee of an equity of redemption to redeem a mortgage made in 1819. The defendants denied this mortgage and in order to sustain their denial brought forward an earlier mortgage and their title having thus been disclosed the Courts proceeded to try the plaintiff's right to redeem that mortgage and the defendant did not object to this course being taken in the Courts below. *Held* that it was too late to take the objection in second appeal that the plaintiff ought not to have been allowed to change his ground of action. The principles which govern questions of this kind are set forth in Lakshmibai v. Hari (9 Bom. H. C. R. 1) and according to them the plaintiff would have been allowed to amend his plaintiff if he could show that he had brought his suit in its original form through some excusable misconception under circumstances consistent with good faith. This rule would not allow a plaintiff in general after bringing a suit on a document, the proof of which entirely fails, to go on and succeed upon a title disclosed in the course of the defence.

Ganesh v. Ramchandra. ...108

4.—*Application to set aside execution sale—Notice—Appeal—Civil Procedure Code, Act X of 1877 S. 312.*] Where an application is made by judgment-debtor to set aside a sale in execution of a decree, notice must be given to the parties named in the application. It is not enough to give an oral intimation to the pleader for the applicant that the application will be enquired into on a day named. No appeal lies from an order made *ex parte* under para 2 S. 312 of Act X of 1877.

Sitaram v. Govind. ...308

5.—*Counter claim—Set off—Refusal to decide issue—Res judicata*] Where a defendant, in answer to the plaintiff's claim, sets up a counter claim, not for an ascertained debt but for unliquidated damages, and therefore not the subject of a set off or counter claim under S. 121 of Act VIII of 1859 or S. 111 of Act X of 1877, the Court has no jurisdiction to decide on the issues raised in respect of such counter claim ; and if it refuses to do so, the defendant would not be barred by S. 13 of Act X of 1877, from bringing an independent suit in respect thereof.

Ghanasham v. Pandurang. ...338

6.—*Dismissal of suit for default—Removal of manager of temple.*]

A suit should not be dismissed for default of appearance by the plaintiff, where the original plaintiff, who has instituted the suit as



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manager of a temple but has been subsequently removed from office, is present in Court on the day of the hearing, and contends that he still retains an interest in the suit. This point should be decided and if found against him, the defendant should apply for notice to be issued against the successor of the original plaintiff requiring him to elect within a reasonable time as to whether or not he would proceed with the suit.

Goswami shri Gordhanlalji v. Goswami shri Vraj Ochhavji ... 12

7.—*Instalment decree.*] A decree should not be made payable by instalments on a mere allegation of the defendant not made upon oath.

Bai Tulsa v. Seriadiji. ... 99

8.—*Non-resident plaintiff—Appearance by general agent*] A plaintiff had a house at Broach to which she went every year for 5 or 6 months and she had gone there 4 months before she instituted a suit in the Nandurbar Court and had remained there for two months afterwards. *Held* that she was not resident within the local limits of the jurisdiction of the Nandurbar Court when the plaint was presented and she was therefore entitled to appear by a person holding a general power of attorney.

Dulabh v. Lakshman ... 205

9.—*Residence of person on pilgrimage.*]— A person who has gone to Benares on a temporary pilgrimage cannot, in the absence of other relevant circumstances, be held to be "nonresident" at the place where he has his permanent home.

Gopal v. Posu Bhan ... 262

10.—*Appeal from order—Reference by District Court—Civ. Pro. Code, Ss. 53, 588 and 617.*] No appeal lies from an order rejecting a plaint under S. 53 Cl. C. of Act X of 1877, and a District Judge to whom such an appeal is made has no power under S. 617 to refer to the High Court a question arising in such an appeal.

Ranchodrai v. Lakshman. ... 69

11-12.—*Reference—Civil Procedure Code, S. 617.*] in a case in which a plaint has been registered, and issues framed, a reference under S. 617 of Act X of 1877 is unauthorized, because the decision in it is appealable.

William Lowerley v. Dhanjisha. ... 159

Gavrishankar v. Narottamdas. ... 159

13.—*Reference—Civil Procedure Code, s. 617—Return of plaint.*] A reference to the High Court cannot be made under s. 617 of Act X of 1877 in case in which the plaint has not been filed where the decree of the Subordinate Judge, if made, would not be final. The mere fact that an order returning a plaint under s. 57 (a) of Act X of 1877 is not appealable does not enable a Subordinate Court to make a reference.

Furdunji v. Edalji. 160

14.—*Plaint, amendment of, in second appeal.*] Where a plaintiff has an honest case and has failed by some misapprehension in putting his case properly, it is but right to give him an opportunity of amending his plaint and the suit should be tried on the merits.

Balmukandas v. Bai Divali. ... 233

15.—*Transfer of a Civil suit from Mofussil to High Court.*] An application for the transfer of a civil suit from a Mofussil Court to

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the High Court may be regarded as one made to the High Court in its original jurisdiction and according to Ss, 13 and 14 of Stat. 24 and 25 Vic. C. 104, and the Rule, Chapter II s. 4 of those made under that Act, should be dealt with either by a single Judge or a Division Court constituted according to the determination of the Chief Justice as to the class of cases to be taken by each Judge either singly or in a Division Bench. Achratlal v. Guzerat. S. and W. Co. ... 115

16.—*Witnesses, refusal to examine.*] A Judge cannot refuse to examine witnesses called by a party to a suit on the ground that they are intended to say the same thing as a witness whom he has disbelieved. Balkrishna v. Keshavlal. ... 306

17.—*Unnecessary party—Striking out such party in appeal—Ejectment.*] If a person has been unnecessarily or improperly made a party without any objection by the plaintiff, the Appellate Court is not justified in removing the name of that person from the suit. In an ejectment suit a person under whom the other defendants claim to hold property is a necessary party. Aba v. Sheik Mohidin ... 206

PROFIT A prendre in alieno solo.

See Timber 1.

PROMISSORY note on demand.

See Limitation 13.

PUBLIC Road.

See Bom. Act IV of 1868, S. 11.

PUISNE mortgage's right to redeem.

See Mortgage 12-13.

REDEMPTION

———Co-mortgagor.

See Mortgage 14.

———With notice of sub-mortgage.

See Mortgage 18.

———Without notice of submortgage.

See Mortgage 1, 17.

REDEMPTION suit, accounts.

See Mortgage 12, 13.

———Parties.

See Mortgage 1, 12, 13, 15.

REFERENCE to High Court.

See Procedure 10-13.

REGISTRATION.

1.—*Agreement not to execute decree—Interest in immoveable property.*] The right to execute a decree is not a right or interest in or to the immoveable estate of the judgment-debtor, but simply a right to apply for the process of the Court, hence an agreement which limits or extinguishes the right to execute a decree does not require registration. Premchand v. Goswami Jadunathji ... 360

2.—*Priority—Subsequent mortgage registered before prior mortgage—Bom. Reg. IX of 1827, S. 6, cl. 1—Act I of 1843—Act XIX 1843—Act XVI of 1864 Ss. 1, 4 and 67—Maintenance right to.*] A mortgage deed executed in 1864 and registered prior to the passing of

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REGISTRATION.

Act XVI of 1864 invalidates a prior mortgage of the same lands executed in 1862 and registered subsequently ; S. 67 of Act XVI of 1864 being controlled by Ss. 1 and 2 which have the effect of maintaining Bom. Reg. IX of 1827, S. 6, cl. 1 and Acts 1 and XIX of 1843 in force so far as regards instruments registered under them.

Hari v. Ramji. ... 28

REGISTRATION Act XVI of 1864, Ss. 1-2.

See Registration 2.

REMAND by Special Judge.

See Procedure 15.

RENT, parties to suit for.

See, Parties to suit for rent 2, 5.

RENT, enhancement of.

See Enhancement of rent.

RES JUDICATA, consent decree.

See Res judicata 1.

— Dismissal of suit with leave to file fresh one.

See Res judicata 2.

— Identity of cause of action.

See Res Judicata 3-5.

1.—*Decree by consent.*] Where a decree has been passed by consent of the plaintiff and one of the defendants in a suit, which decree expressly binds another defendant who is represented by the same pleader as the consenting defendant and such other defendant takes no steps to set aside the decree, such decree, so long as it remains unreversed and unaltered, operates as *res judicata* so as to bar another suit by that other defendant against the plaintiff in the former suit in respect of the same subject matter.

Hari v. Naro. ... 313

2.—*Objection raised at late period as to—Dismissal of former suit with leave to file fresh one.*] Where the objection of *res judicata* was raised at a late period of the hearing of the appeal the Court having regard to the decision in *Bhisto Shankar v. Ramchandra* (8 Bom. H. C. R. A. C. J. 80) and *Shridhar Vinayak v. Narayan Babaji* (11 Bom. H. C. R. 224) declined to allow the objection to prevail notwithstanding the decision of the Calcutta High Court in *Dinobundhu v. Kristomonce* (2 Calc. 152), saying that in a former suit between the present parties, leave was reserved to the plaintiffs to bring this suit : and although such a permission would not of course operate to render admissible a suit which was clearly inadmissible by law, yet the circumstance may well strengthen us in the resolution to adhere to the previous decisions of this Court on a doubtful point of law. Had it not been for those decisions, the Court which heard the former suit would not doubt have permitted the plaintiffs to withdraw from that suit with liberty to bring a fresh suit, and had that course been adopted no question could have been raised as to the admissibility of the present suit. It would be very inequitable to depart from the established course of decisions in this Court, when the effect of such departure would be to deprive the plaintiffs of a remedy which the

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RES JUDICATA.

Court trying the former suit intended to reserve to them by permitting a withdrawal, if not by inserting an order to that effect in its judgment. *Rambhaji v. Mahadaji.* ... 200

3.—*Ejectment—Suit based on lease—Subsequent suit based on mortgage.*] The dismissal of a former suit to recover possession of land based on an alleged lease on the ground that the lease was not proved, does not operate as *res judicata* so as to bar a subsequent suit for the same property based on a mortgage.

Yeshvadabai v. Gangadhar. ... 229

4.—*Identity of cause of action.*] The dismissal of an ejectment suit against A. as a trespasser, is no bar to a suit against A's heir to recover the property on the ground that as A. held the land for maintenance only, the plaintiff is entitled to recover it on A's death.

Ganesh v. Gajai. ... 403

5.—*Arrangement Subsequent to a decree in previous suit.*] Where land was assigned to plaintiff's father subsequently to a decree passed against him in consideration of the plaintiff's father not appealing, held in a suit to recover that land that the question of *res judicata* does not arise.

Vithai v- Avji. ... 21

RESTITUTION of conjugal rights.

1.—*Cruelty—Unfounded charge of bigamy and theft.*] Where a Hindu husband beat and expelled his wife from his house and also charged her falsely with theft and bigamy, and the Courts below had arrived at the conclusion that it would be dangerous to the personal safety of the wife to send her back to live with her husband the High Court refused to interfere although the evidence of cruelty was not so specific or strong as might be desirable.

Uka v. Bai Hetu ... 394

2.—*laches in seeking.*] Where a wife left her husband's house in consequence of an assault on her by her husband and his kept mistress, and the husband deferred his suit for restitution of conjugal rights for four years, leaving his wife without maintenance, and then resorted to the Civil Court as a counter movement to an application by the wife to the Magistrate for an order for maintenance. Held, that laches under such circumstances coupled with his previous conduct towards his wife, disentitled him to the assistance of the Court.

Basapa v. Ningi. ... 1

RESUMPTION.

1.—*Service lands—Shetsandi.*] Lands granted in *inam* for *Shetsandi* service cannot be resumed merely because such services are no longer required by Government from the holders.

Jivaji v. Bhimrav. ... 255

2.—*of land on service tenure.*] Where a person holding lands was a dependant member of the clan of the defendant paying Salami and doing occasional service on State occasions; Held that the continuance of such lands after the death of the last holder was at the discretion of the defendant and not a matter of right.

Nhanesing v. Raul Indrasing. ... 338



RETROSPECTIVE EFFECT.

See Construction of Statute I.

See Sale in execution of decree 1.

RE-UNION.

See Hindu Law—Partition 4.

REVISION.

1.—*Extraordinary jurisdiction.*] A party to a suit is not entitled to invoke the extraordinary jurisdiction of the High Court simply because the decision of the lower Court is wrong. It is exercised generally only when a lower Court has exceeded its jurisdiction or has declined to exercise a jurisdiction with which it is clothed or where great irreparable wrong is done by a decree or order of a lower Court. It will thus be not exercised in a case in which a member of an undivided Hindu family has been granted partition.

Trikam v. Naro. ... 281.

2.—*Extraordinary jurisdiction.*] It is not in every case that the High Court ought to exercise its extraordinary jurisdiction there may have been an error in laid that under S. 622 of the Civil Procedure Code by interfering with the decree of a Court of inferior jurisdiction. *Directors of Jafar Alli S. and W. Co. v. Bhaidas.* ... 301

REVIAR.

See Limitation 11.

RIGHT to sue.

———To abate public nuisance.

See Right to sue 1.

———Cause of action.

See Right to sue 2.

———Decree barred by limitation.

See Right to sue 3.

———Dignity, suit to vindicate.

See Right to sue 4.

———Order directing restoration of property sold in execution, suit to set aside.

See Right to sue 5.

1.—*To abate nuisance.*] A plaintiff is entitled to sue where he complains that a portion of a *pol* or *mohla* belonging to the inhabitants of the houses in the *mohla* as tenants in common, has been monopolised by one of them by building a shed thereon to the exclusion of the others, where the cases put forward by both parties are inconsistent with the *pol* or *mohla* being a public street or *mohla*.

Babar Haribhai v. Nathu ... 398

2.—*Cause of action.*] The statement of the defendant's pleader in a suit to which the plaintiffs were not parties, denying the right of any person to enter a particular temple without the permission of the plaintiffs in that suit who are the defendants in the subsequent suit, constitutes no cause of action.

Mulji v. Keshavlal ... 310

3.—*Decree, execution whereof barred by limitation—suit for property, title to which declared by.*] The plaintiff's assignor obtained a decree on a mortgage whereby she became entitled as against U. and others to possession of a house. Resistance was offered by S. and

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RIGHT TO SUE.

the judgment creditor having applied to the court, her right to possession was affirmed. S. then sued to establish her right, but the suit abated by her death and the judgment-creditor then seeking possession in accordance with the decree and the order against S. was resisted by the present defendants who had taken under S :—Held, that although execution of the decree obtained by the plaintiff's assignor was barred by limitation, yet the right created or established by a judicial order in the course of the execution already had was not therefore extinguished. The enactment which gives to an unsuccessful party in application arising out of resistance to execution one year within which to sue to establish his right, does not either directly or by analogy impose upon the successful party the necessity of actually turning the other out within the same time. A title once established, though in a suit incapable of execution through lapse of time, is still binding on the parties in future litigation. The judgment-creditor having an order for possession, against S. her right of entry thus established and that of her assignee would not apparently be barred in less than twelve years. New opponents having arisen, the assignee of the judgment-creditor's right had to sue them to establish his title.

Balshastri v. Hari. ... 120

4.—*Dignity, suit to vindicate.*] As to that part of a decree which pronounced the plaintiff entitled as against a temple committee, alienees of the village revenue, to pass or join in passing the annual Kabuliyat, in which it urged that as the managers passing a Kabuliyat must account for exactly what they receive, the alleged right which the defendants were called on to recognize was one attended with no possible pecuniary advantage and was a mere onerous dignity, the denial of which did not form a ground of action cognizable by a Civil Court, the Court said:—It has been held in many cases that where the payment of a fee is purely voluntray, no action lies by one asserting a right to the sum paid against the person who he says has wrongfully received them. Dignities too, the essence of which consists in voluntary tributes of respect, which derive their whole value from their spontaneousness, do not in their nature admit of effectual protection by the Municipal Courts. So also where the act of a public servant, avowedly not touching private rights, and legally inoperative as regards such rights merely puts people into an unusual position from which wrong inferences might be drawn to their detriment by those who form hasty judgments, it is recognized that such an act though the person affected may be really inconvenienced in consequence of it, does not form a ground of action. The Sadar Court, on remand, ruled that redress in this particular case must be sought through the executive Government, and not through the Courts of law. But it does not follow from this that no dignities at all, provided a money gain is not attached to them, are fit objects to be protected by the Courts. The right, if it subsists, to collect the revenues of a village is a dignity of a very practical kind, the enjoyment of which those who are concerned ought not to obstruct, and which the Courts are quite able to protect without lending encourage-

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RIGHT TO SUE.

ment to frivolous litigation. Where, too, the dignity carries with it a right to receive money, we are not satisfied that it can be placed in the same category as the right to be carried crosswise in a palki, or to cut the throat of a sacrificial ox. No case has been cited to us in which, where the right to levy money existed, it was held unfit for protection by the Courts because the money when levied must be handed over to some higher recipient. The English cases have mostly been between the rightful holder of some office and an alleged usurper; but if the right subsists, and can be practically exercised only by some concurrent act on the part of another, the right to this latter act may, by the original grant, or by prescription, have become adherent to the principal right. The Courts below say that this is such a case. The temple committee, they have found, having always until lately, accepted a kabulayat from the plaintiffs and another class of persons, the kulkarnis, jointly, had become bound to adhere to that practice. And according to ordinary principles presumption would certainly arise, supposing a definite profit had been realised by the plaintiffs, that the part which the committee had uniformly played, was the performance of a legal duty correlative to a right vested in the plaintiffs. It may be, and it seems likely, that the plaintiffs cannot make a profit out of the position they claim, but under the circumstances that we have stated, we do not think that on that account it can be said they have not and cannot have an effectual ground of action against the defendants. *Ramchandra v. Ram Babu.* ...76

5.—*To set aside an order directing restoration of property sold in execution to person in possession at time of sale.*] No suit will lie by the purchaser at an execution sale of a share in *inam* land to set aside an order directing restoration of possession of the lands sold to the person, not being the judgment-debtor, who has been dispossessed on the purchaser's application. The proper course for the purchaser (plaintiff) is to bring a suit for partition against such person or persons as might be judgment-debtor's co-parceners in the lands joining with them as co-defendants such other persons, if any, who claim to hold the land independently of any estate or interest of the judgment-debtor therein. *Keshav v. Lakshman.* ...28

RIGHT of way.

See Easement.

SALE.

See Execution of decree 1.

—Mortgage or.

See Mortgage 15, 16.

SALE in execution of decree.

—Against father of Hindu family.

See Hindu Law—Alienation of ancestral property 3.

—Against Hindu widow.

See Sale in execution of decree 2.

—Against member of undivided Hindu family.

See Hindu Law—Undivided family 2.

—Application to set aside.

See Procedure 4.



SALE in execution of decree.

—By the Collector.

See Sale in execution of decree 1.

—Material irregularity.

See Sale in execution of decree 6.

—Lien on property sold.

See Sale in execution of decree 7.

—Mortgage decree, stay of.

See Sale in execution of decree 3. and execution of decree 13.

—Proof of.

See Sale in execution of decree 4.

—Setting aside.

See Sale in execution decree 5. 6.

1.—*By Collector—Act. X of 1877, S.—320 Government Notification 7733 of 22nd December 1879—Construction—Retrospective effect—Nemo debet esse judex in propria causa.*] The Government notification (No. 7733) of the 22nd December 1879 is retrospective and is applicable to sale of immoveable property ordered on Darkhasts presented before the date of notification. It is concerned with procedure only, and takes away no right. It follows the language of Section 320 of Act X of 1877 which was intended to apply as well to sale, already directed, but not carried into effect as to sales to be thereafter directed. A Collector though an administrator of the estate of the infant Defendants under Act XX of 1864 may lawfully be appointed to conduct the sale of the property of the infants even though Section 321 (taken in connection with Section 305) and Sections 322 to 327 inclusive impose upon the Collector judicial duties. No doubt it is a maxim of law that no man shall be a judge in his own cause yet it is competent for the legislature to over-rule it in particular cases.

Mehta Samul v. Pirzada Pirmian. ... 367

2.—*Against Hindu widow.*] A Hindu widow has something more than a life tenancy. She fully represents the estate, and for certain necessary purposes has full authority to dispose of the property. If she herself sells for a necessary purpose, or if a Court sells the property in satisfaction of debt incurred for a necessary purpose, the purchaser acquires not a mere life interest, but the entire estate.

Bhau Venkoba v. Govind. ... 22

3.—*Mortgage decree, stay of, to enable judgment-debtor to mortgage or sell—Act X of 1877, S, 305.*] A judgment-debtor against whom a decree on a mortgage had been made, obtained without opposition on the part of the judgment-creditor an order under S. 305 of Act X of 1877 (Civil Procedure Code) staying the sale of the mortgaged property in order to enable him to sell or mortgage the same to satisfy the mortgage-decree, and succeeded in selling the property under registered deeds of sale, the purchaser paying into Court sufficient of the purchase money to satisfy the mortgage decree. The deeds of sale were then lodged in Court for the confirmation of the sale. At this time another suit by the judgment-creditor for money, not founded on any mortgage of the property, nor seeking to enforce any lien thereon was pending and the Court



SALE IN EXECUTION DECREE.

delayed disposing of the application for the confirmation of the sale until the mortgagee had obtained a money decree therein, and then on the mortgagee's application refused to confirm the sale and ordered the purchase-money to be returned. *Held* that the court was wrong in so acting, and an order was made directing the lower Court to confirm the sale. *Umadkhansama v. Maharanee Raj Roop Koer* I W. R. 295 dissented from. *Rachapa v. Ravji.* ... 363

4.—*Proof of.*] A Karkun's memorandum of the sale and of payment of purchase money is not sufficient proof of a sale without proof of confirmation of the sale and of the certificate.

Gulam Husain v. Damodar. ... 362

5.—*Setting aside—Inadequacy of price.*] The smallness of the sum realised at a sale in execution of a decree is not a sufficient ground for setting the sale aside, if there has been no material irregularity in publishing or conducting the sale.

Hari v. Bawaji. ... 286

6.—*Setting aside—Civil Procedure Code, Act X of 1877, S. 313.*] Previously to setting aside a sale under S. 313 of Act X of 1877, the Court is bound to enquire whether the person whose alleged property has been sold had no saleable interest therein and the judgment-debtor and judgment-creditor must be given an opportunity of being heard on such enquiry. The mere production by the applicant of a certified copy of a registered deed of sale from the judgment-debtor is not sufficient ground for setting aside the sale. The *bona fides* and due execution of the deed before the attachment was laid on must be proved.

Gulam Mohidin v. Bala. ... 357

SATARA, application of Regulation to.

See Limitation 12.

SECOND appeal, amendment of plaint on.

See Procedure 3.

—Evidence.

See Appeal 5-9.

SECONDARY evidence.

See Evidence 5, 7.

—Unregistered deed, admission of execution of.

See Evidence 7.

SECURITY for costs—*Pauper Appeal.*] Security for costs may be demanded from a pauper appellant but the mere fact of his pauperism is not a sufficient ground for doing so. *Ganpatrav v. Ramrav* ... 267

SELF-acquired property.

See Hindu Law—Self-acquired property.

SERVICE lands, resumption of.

See Resumption.

SERVICE Tenure—*Grant, construction of—Performance of service.*]

Where a grant of land was made "on account of the eldership" and it contained a clause that "inasmuch as the *vriti* and the *haks* at Hudli, and 7 (other) items have been set apart on account of eldership, Dada himself should perform whatever work there may be in

III 55,



SERVICE TENURE.

connection with the vatan, such as the Sarkar accounts." &c.—*Held* that these words cannot be construed as making the tenure dependent upon the continued performance of service. They clearly indicate that the grant was already complete, and had been made on account of eldership, but they superimpose on it a condition for the performance of service. At the most, the performance of service is only a portion of consideration for the grant; and therefore, in the absence of express words declaring that, the service ceasing, the tenure shall determine, the grant does not become void merely for the reason that the service ceases to be performed. *Nilkantrav v. Jivanrav.* ... 81

SET-off.

See Procedure 5.

SIRDARS of Dekkhan.

See Jurisdiction 9.

SMALL Cause Court. Mofussil.

1.—*Suit cognizable by—Special Appeal—Incidental determination of title to immovable property*] No special appeal lies in a suit for personal property or its value where such value is less than Rs. 500, notwithstanding that the lower Courts have, incidentally, and for the purposes of determining the amount of damages, adjudicated upon a question of title to immovable property. *Trikam v. Narayanrav.* ... 18

2.—*Suit cognizable by—claim for mesne profits—Incidental enquiry into question of title—Special Appeal*] No special appeal lies in a suit for mesne profits which is a suit of the nature cognizable by a Court of Small Causes, notwithstanding that a question of title has been incidentally inquired into by the Courts below.

Narayan v. Parashram ... 18

3.—*Jurisdiction—Damages for malicious prosecution.*] A suit for less than Rs. 500 for damages for imprisonment and malicious prosecution is cognizable by a Small Cause Court.

Sankappa v. Basappa. ... 311

4.—*Maintenance, suit for—Second appeal*] A suit for maintenance is not cognizable by a Small Cause Court and therefore a second appeal lies.

Jivi v. Ramji. ... 70

5.—*Jurisdiction—money improperly levied by Collector—Second appeal.*] A suit to recover money received by the Collector to the use of the plaintiffs, is, if less than Rs. 500, cognizable by a Court of Small Causes, and it follows that no special appeal lies.

Sarupchand v. Collector of Ahmedabad. ... 10

SPLITTING cause of action.

1.—*Civil Procedure Code Act VIII of 1859 S. 7—withdrawal of suit with leave to bring of fresh suit.*] S. 7 of Act VIII of 1859 must be read with the section which allows the withdrawal of a suit with permission to bring another must be allowed its proper operation in placing the plaintiff in the *status quo ante*, and what s. 7 really intends is that the plaintiff should not be allowed two adjudications or the chances of two on the same cause or on a matter which ought to have been included in the same cause. When a suit is withdrawn there is no adjudication.

Imamsaheb v. Sayad Hazratsaheb. ... 138

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SPLITTING CAUSE OF ACTION.

2.—*Interest and principal, separate suits for.*] There may be cases in which on account of a particular term being stipulated for repayment of the principal and periodical times for payment of interest each instalment of the interest may be separately claimed apart from the principal, but in the absence of some special circumstances of that kind, interest adheres to the principal so that no two sums but one sum may properly be claimed, non-payment of which constitutes one, not two causes of action. Janibai v. Babaji. ...44

STAMP.

—Accounts-Acknowledgment.

See Stamp 1.

—Khata agreeing to pay debt of third person,

See Stamp 1.

—Lease.

See Stamp 2-3.

—Penalty.

See Stamp 4.

—Promissory note payable otherwise than one demand.

See Stamp 4.

—Receipt.

See Stamp 5.

1.—*Khata agreeing to pay debt of third person.*] A khata passed by one person in favour of another, agreeing to pay a debt due by a third person requires a stamp of eight annas.

Hormusji v. Dayabhoy. ...395

2.—*Lease—Stamp Act XVIII of 1869, S. 3, cl. 15, Sch. 1, art 15.*] An instrument by which the party executing it agrees to take land for 10 years rent-free, and to surrender it at the end of that term, but, if he overholds to pay Rs. 100 *per annum* in respect of the land so long as he overholds, is a lease within the meaning of S. 3 cl. 15 of Act XVII of 1869 and article 15 of Sch. I of that Act shows that the stamp duty payable on such document is Rs. 1.

Vithoji v. Tukaram. ...396

3.—*Stamp Act XVIII of 1869 S. 51, cl. 10—Lease to cultivator.*] Under clause 10 of Section 15 of Act XVIII of 1869 a lease granted in 1877 to a "cultivator" without payment by him of any fine or premium in consideration is exempted from stamp duty.

Nagarbhai v. Govindram. ...356

4.—*Penalty—Promissory note payable otherwise than on demand—Act XVIII of 1869 Ss. 20, 24, 28, Sch. 1, art 2.*] A khata amounting to a promissory note payable otherwise than on demand, and exceeding Rs. 100 but not exceeding Rs. 200 is liable to a stamp duty of 2 annas under Act XVIII of 1869, Sch. I, art. 2 and S. 28 of that Act precludes the application of Ss. 20 or 24 to such a document which, if unstamped, cannot be admitted in evidence on payment of additional stamp duty and penalty.

Hiralal v. Kalidas. ... 397

5.—*Receipt.*] A receipt for ornaments does not require to be stamped.

Bai Shivkor v. Dalichand. ... 282

~~CONFIDENTIAL~~—S. 3, cl. 15.

~~_____~~ S. 15, cl. 10.

—————Ss. 20, 24, 28.

—Sch. I. Art. 2

— — — — — Sch. I, Art 15.

STANDING CROPS.—*Execution of decree.*] Standing crops are immoveable property and should be so treated in the execution of decrees. Kirpashankar v. Govind. ... 396

See Procedure 15.

See Execution of decree 13.

See Sale in execution of decree 3.

See Principal and surety 2.

STEP-DAUGHTER'S son, inheritance by.

See Hindu Law.—Inheritance of female.

STEP in aid of execution.

See Limitation 9-10.

STRANGER to record.

See Costs 3.

STRIDHAN.

See Hindu Law—Inheritance and Hindu Law—Stridhan.

SUCCESSION.

See Inheritance.

SURETY.

See Principal and surety.

TENANT from year to year, Notice to quit.

See Landlord and tenant 2.

TIMBER.

1.—*Right to cut—Wurkas land—Profit a prendre—Custom—Prescription—Joint survey Rules, Rule X.*] It is now settled law that all waste land belongs to the State and wurkas lands must be regarded as to all intents and purposes waste lands. The fact that a sutidar's wurkas lands have always been marked off by distinct boundaries from the wurkas of his neighbours with the knowledge of Government officers who have never interfered with his exclusive enjoyment of them will not be a recognition by Government of the proprietary title of such sutidar in the wurkas lands. The soil of such lands being the property of Government the Sutidar cannot either by custom or prescription, acquire an unlimited right to cut down trees growing upon that soil. A *profit prendre* in another's soil cannot be claimed by custom, however ancient, uniform and clear. the exercise of that custom may have been ; and an unlimited *profit a prendre* on another's soil cannot be claimed by prescription. Previously to the introduction of the Revenue Survey in the Thana Col-



TIMBER.

lectorate, the felling of teak trees was universally prohibited and that the right of Government to do this was never questioned ; right to all other trees, standing on or to be afterwards planted on, their own lands was conceded to the occupants. Wurkas lands were not treated as private lands, but as Government waste ; the right of the cultivators to take *rah* from those lands for manuring their rice fields was recognized, but they were prohibited from felling upon those lands trees of certain specified descriptions, although as a favour and not as a right they were permitted to cut common wood for domestic use, but not for trading purposes. Rule X of the Joint Survey Rules was not introduced into the Konkan or was introduced with a reservation of the Government rights in "ain, teak, sisav and other trees." The holders of rice fields in the Konkan whatever may be their tenure of such fields are not the proprietors of the soil in the wurkas lands held by them and are not entitled by custom or prescription or by any grant or recognition on the part of Government to cut down teak, or other specially reserved trees growing on wurkas lands of which they are occupants.

Vasudev v. The Collector of Thana ... 130

2.—*Joint Survey Rules 10 and 11.*] Rules 10 and 11 of the Joint Survey Rules are not applicable to the Konkan in which the timber in question is situated.

Shridhar v. Asstt. Conservator of forests, Kolaba. ... 203

TITLE, incidental determination of, to immovable property.

See Small Cause Court 1, 2.

TRANSFER of Civil suit to High Court.

See Procedure 15.

TREES.

See Timber.

UDHAD BANDHI Jama village.

See Assessment, Exemption from.

UNDIVIDED Hindu family.

See Hindu Law—Undivided family.

UNEXPIRED mortgage with possession,

See Alienation by guardian 1.

UNREGISTERED deed. Secondary evidence of.

See Evidence 5.

VATAN.

———Alienation of.

See Vatan 1.

———Partition of.

See Vatan 2.

———Service.

See Resumption and service tenure.

1.—*Alienation of Joshi Vatan.*] Where the sale of a Vatan has been fully accepted by the plaintiff, who being the Joshi entered into an agreement after the sale of his interest to the defendant to become his deputy performing the duties for a certain



VATAN.

portion of the emoluments, it is not open for the plaintiff to object to the sale. **Ramkrishna v. Umaji** ... 157

2.—*Suit for partition of—Bombay Act III of 1874.*] There is nothing in Bombay Act III of 1874 rendering the sanction of the Collector necessary to the bringing of a suit for partition of a vatan. **Chandrarav v. Vitalrav.** ... 380

VILLAGE Munsiff, jurisdiction in rent suit.

See Jurisdiction 10.

VRITI, mortgage of.

See Mortgage 19.

WARKAS land.

See Timber 1.

WASTE land.

See Timber 1.

WATER-course.

See Limitation 4.

WAY, right of.

See Easement.

WILL.

See Hindu Law—Will.

WITNESS, refusal to examine.

See Procedure 16.

—Late application to summon.

See Practice 2.



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